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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 412

J. R. MASON,
Petitioner,

vs.

GLENN-COLUSA IRRIGATION DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision (R. 311, 318) of the Circuit Court of Appeals for the Ninth Circuit made in the above entitled cause on June 20, 1944, which reverses the

order denying petition for final decree of the District Court for the Northern District of California, Southern Division, rendered against the respondent herein on June 2, 1943. (R. 295.)

OPINION BELOW.

Opinion of Circuit Court of Appeals, ...Fed. (2d) ..... (R. 311.)

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered June 20, 1944. (R. 318.) The mandate was stayed until disposition of the case by this Court. (Not in Record.) The jurisdiction of this Court is invoked under Sec. 204a of the Judicial Code. (28 U.S.C., par. 347(a).)

STATUTES INVOLVED.

Municipal Bankruptcy Act of August 16, 1937, c. 657 (50 Stat. 654), 11 U.S.C. 401-404, adding Sections 81-84; and Act of June 22, 1938, c. 575, Section 3(b). (52 Stat. 940.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a proceeding brought by the respondent Glenn-Colusa Irrigation District, a California Irrigation District and a public corporation and state

governmental agency (organized under Cal. Stats. 1897, p. 254, as amended, known as "the California Irrigation District Act", being presently Division 11, Water Code of California, Chap. 368, Statutes of 1943), for readjustment of its debts under what is now Chapter IX of the Bankruptcy Act of 1898, as amended. (11 U.S.C., Sections 401-404.)

The interlocutory decree confirming the irrigation district's plan of composition was confirmed by the District Court on April 16, 1940. (R. 69.)

The district applied to the District Court for a final decree May 1, 1942. (R. 83.) The matter was submitted. (R. 93.) Petitioner J. R. Mason on behalf of himself and the other creditors (R. 143) moved the Court for an order setting aside the submission and denying the proposed final decree January 11, 1943. (R. 95, 96.) The final decree was denied by Hon. A. F. St. Sure, District Judge, February 23, 1943 (R. 148) without prejudice and upon further hearing denied. (R. 294.)

The irrigation district appealed and the Circuit Court of Appeals for the Ninth Circuit reversed the order denying the petition for a final decree on June 20, 1944. (R. 318.)

The order of the District Court was based on the principal ground that there was a deviation from and substantial modification of the plan approved by the interlocutory decree and that the plan had not been carried into effect. (R. 295.) The Circuit Court so interpreted the lower Court's order (R. 313) but held

that there had been no such modification or deviation. (R. 316.)

Thus the matter involved is largely one of law although there is some confusion as to what the plan of composition actually provided in the way of payments and how the plan should be interpreted.

The relation of the interlocutory to the final decree and the scope of the latter has never been passed upon by this Court.

QUESTIONS PRESENTED.

1. Where it is equitable for a taxing agency to raise and it is able to raise $802,500 from the Reconstruction Finance Corporation to pay its creditors, should they not receive the percentage on their claims that would result to them from a distribution of this amount, and where the plan of composition actually required the borrowing of only $660,943 thereof is there not such a deviation from and substantial modification of the plan approved by the interlocutory decree as warrants a holding that the plan has not been carried into effect?

2. Where the plan of composition disclosed an ability to borrow $802,500 in 1934 (bankruptcy petition filed in 1937), disburses only $660,943 to the creditors as the proceeds of the confirmed sale of the debtor's new refunding bonds under the interlocutory decree entered in 1940, and where the plan of composition provides and the interlocutory decree pro-

vides for the issuance of 4% refunding bonds to the Reconstruction Finance Corporation in the amount of $660,943 to mature serially from 1939 to 1968, commencing in 1939 with $14,500 and gradually increasing to $44,500 (R. 188), but the irrigation district by 1942 and prior to entry of a final decree has paid down its indebtedness to $425,000, has not the District Court jurisdiction and power to deny the petition for a final decree on the grounds that the debtor has not paid its creditors what it fairly and justly should pay?

3. Where the interlocutory decree as well as the plan of composition provide for the issuance of 4% refunding bonds to the Reconstruction Finance Corporation in exchange for the original bonds (R. 61), but the debtor before the entry of the final decree is able to and does obtain money at 3¼% and actually issues and sells its new refunding bonds to a new money lender, thus effecting a saving of $27,000, are not the creditors entitled to this saving instead of the debtor?

4. Where the debtor after the date of the interlocutory decree and prior to entry of a final decree has paid off and discharged the original indebtedness proposed to be composed in the bankruptcy proceedings by obtaining new credit not pursuant to the plan or the interlocutory decree confirming the plan, does not the jurisdiction of the bankruptcy Court to enter a final decree cease and is the bankruptcy Court not then required to dismiss the proceedings, or as in this case to deny a final decree?

Is not composition a contract, which when abandoned or departed from by the debtor it can no longer enforce? Can the consent of the majority bondholders survive the liquidation and cancellation of their bonds, when cancelled before the entry of a final decree?

REASONS FOR GRANTING WRIT OF CERTIORARI.

1. Neither the procedure and administration under the Municipal Bankruptcy Statute insofar as it pertains to the entry of the final decree nor the execution of the plan of composition has been considered in any opinion of this Court.

The matter is of considerable public importance.

2. Many public debtors after the adoption of a plan of composition and even after the entry of an interlocutory decree have been able to obtain cheaper money. Until the plan is finally executed and a decree so determining entered, we contend that benefits so derived by the debtor justly belong to the creditors.

3. Where the interlocutory decree shows it is equitable for the debtor to borrow $802,500, and this sum of money can be borrowed, the intricacy of the plan of composition, we submit, should not defeat the right of the creditors to pro rata distribution.

4. We submit this Court should determine that the District Court is empowered to interpret the interlocutory decree and even to modify it.

5. We submit that this Court should determine that where the debt represented in the composition

has been fully liquidated and cancelled before jurisdiction of the bankruptcy Court ceases and before final decree, the proceedings should be dismissed.

Wherefore, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said Court in the case numbered and entitled in its dockets as "No. 10,529, Glenn-Colusa Irrigation District, Appellant, vs. J. R. Mason, Appellee", and that the decree of said Court be reversed by this Court with directions to dismiss the bill and appeal and for such other relief as to this Court may seem proper.

Dated, Turlock, California,
August 23, 1944.

J. R. MASON,
Petitioner,
W. COBURN COOK,
Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

J. R. MASON,
Petitioner,
vs.
GLENN-COLUSA IRRIGATION DISTRICT,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FACTUAL BACKGROUND OF THE CASE.

The District Court denied the petition of the respondent (herein referred to as the "district") for a final decree discharging its indebtedness. The Circuit Court reversed.

The facts and proceedings, an understanding of which is necessary, are these:

The Glenn-Colusa Irrigation District is a public corporation for governmental purposes and was formed in 1924 by the consolidation of two districts

theretofore organized under "the California Irrigation District Act", Cal. Stats. 1897, p. 254 as amended.[1]

The consolidation act is Cal. Stats. 1921, p. 1018. (R. 2.)

The area of the district is approximately 121,592 acres located in Glenn and Colusa Counties, California. (R. 3.)

The district incurred or became liable (upon the consolidation) for 6% coupon bonds aggregating $1,248,453.16 in principal amount (R. 4) payable from revenue derived from ad valorem taxes upon the lands (not improvements) but the board may levy water tolls in lieu of assessments. (R. 4.)

The Reconstruction Finance Corporation purchased and held 95% of the bonds when the instant bankruptcy proceeding was commenced (R. 6) November 29, 1937. (R. 23.)

Certain creditors (including petitioner) answered (R. 24) and after the hearing on the bankruptcy petition the District Court confirmed the plan (R. 56) April 16, 1940. (R. 69.) The findings further than reciting the legal conclusion that the plan was fair (R. 54) lacked the specific findings required by the decision in *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 63 S. Ct. 1141, although petitioner made this objection. (R. 69.) An appeal from the interlocutory decree was dismissed. (R. 75.)

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[1]Now embodied in Water Code Div. 11, Ch. 368, Cal. Stat. 1943.

The absence of adequate findings in this case however made it difficult for Judge St. Sure (on motion to deny a final decree) to determine what the truth was as to the ability of the district to pay in view of the district's established ability to borrow $802,500. (R. 11-16.)

From Exhibit "A" attached to the bankruptcy petition (R. 11-16), it appears that prior to October 19, 1934, the district applied to the Reconstruction Finance Corporation for a loan and was awarded a loan "not exceeding $802,500", which was accepted by resolution of the district October 19, 1934. (R. 11.) The Court, it is presumed from the many cases reviewed, will judicially note the use of the words "not exceeding" occurs in the R.F.C. form of bond refinancing contract.

The "plan" contained in this R.F.C. contract was reaffirmed as a plan of composition September 11, 1937 upon its acceptance by the R.F.C. as such. (R. 16.)

The amount actually made available to the creditors was only $660,943. (R. 133.)

The district applied for a final decree. (R. 83, 85.)

J. R. Mason on behalf of himself and the other creditors (R. 143) objected to the entry of the final decree. His principal contention was that the plan submitted to the Court was not carried out. (R. 143.)

This was done by motion and statement (R. 97) and affidavit (R. 100; see appendix A p. ii), on January 11, 1943. (R. 96.)

Counsel for the district filed his counter affidavit. (R. 132; see appendix B p. v.)

These two affidavits show substantially all the facts as the basis of Judge St. Sure's first order denying the petition for final decree (without prejudice) entered February 24, 1943. (R. 142, 148; see appendix C p. vii.)

The district attempted to make a further showing (R. 149) which was countered (R. 288) but Judge St. Sure finally denied the petition for final decree June 2, 1943. (R. 294; see appendix D p. xiv.)

The district appealed June 11, 1943 (R. 296) and the Circuit Court reversed. (R. 311, 318.)

The district admits the ability to borrow $802,500. (R. 133.) It only used $660,943 of this loan to enable the R.F.C. acquire 96% of the bonds.

At the time of the issuance and sale of the refunding 3¼% bonds this was cut down to $425,000. (R. 133.)

The district entirely paid off the R.F.C. (R. 98) and liquidated the old debt out of Court by a new 3¼% issue of bonds sold at a saving of $27,000. (R. 101.)

OPENING STATEMENT.

The gist and heart of respondent's position was that Section 83(f) of the Bankruptcy Act, 11 U.S.C. 403(f) (see appendix A p. i), makes it the duty

of the Court to enter a final decree when the district makes available for all its creditors the consideration proposed in the plan of composition.

This section was very carefully framed and for an express purpose, namely, to prevent any interference by the Bankruptcy Court with the political or governmental affairs of the district.

Indeed, in the case of *U. S. v. Bekins,* 304 U.S. 27, 58 S. Ct. 811, the case in which the constitutionality of the present law was upheld, U. S. Webb, Attorney General of California, with the Attorneys General of six other states, in their A. C. brief, discussing subsection (f), and in arguing that the amended bankruptcy law (then known as Chap. X) in no way interfered with the political or governmental affairs of the state, said:

> "this confirms the purely voluntary nature of the proceeding authorized by Chapter X. Of course, the district is bound by its agreement with the creditors who have accepted the plan, but it is bound under its general authority from the State to make contracts, and not by virtue of the decree of the bankruptcy court, and it is only when the consideration for the composition has been posted by the debtor that the decree itself becomes binding upon the dissenting creditors."

And Mr. Robert Jackson, arguing on behalf of the United States in that case in his brief before the Court of which he is now a member, at page 80, referring to the former Municipal Bankruptcy Act, declared:

> "The order of the court, approving the plan of readjustment, was binding not only on the creditors but also on the taxing district. Section 80(g)"

And from that the Attorney General of the United States argued that the present Bankruptcy Act is wholly voluntary in nature and that the volition or consent of the district, or in other words its veto power, continues to the very end until the district has actually met its contract or proposal in full, and not until then is it binding. Mr. J. R. McBride, in his brief for the Lindsay-Strathmore Irrigation District in the Supreme Court in that case, alludes to the fact that "Chapter X in its corresponding provisions (Sec. 83 (f)) omits the provision making the order or decree binding upon the taxing district. The district is bound by its composition agreement. No other binding force is necessary or provided for."

Well now then, it may be true that in a case free from any of the implications, facts and circumstances preceding the final decree as in this case, the debtor is entitled to a final decree, when it has made available the consideration provided for in the plan.

But that does not mean that the interlocutory decree is binding under all circumstances nor does it mean that the debtor cannot meanwhile freely abandon the plan and thereby become disentitled to a final decree.

On the first point, whether an interlocutory decree is binding, we agree that generally speaking any matters determined by an interlocutory decree are

res judicata. This does not mean that the interlocutory decree cannot be changed, set aside, amended or otherwise modified by the Court as are all other interlocutory decrees. Nor does it mean that it cannot be set aside for breaches of good faith, deviation from the terms of the composition plan or decree, fraud, or for any other circumstances which might appear to justify such action by a Court of Equity.

Thus in *American United Mutual Life Insurance Company v. Haines City, Florida*, 117 Fed. (2d) 574, it was held that an interlocutory decree entered in a municipal bankruptcy case is not final:

> "It may be that some matter has been overlooked, or has subsequently arisen, which makes the plan unworkable, and complicated, but which could easily and justly be remedied. Surprise or mistake may affect it. There ought to be some leeway for such adjustments."

Declaring further:

> "Like other interlocutory judgments it remains in a measure in the court's control if not appealed from."

This decision of the Fifth Circuit is cited as authority by the Seventh Circuit in the recent case of *Re Chicago M. St. P. & P. R. Co.*, 138 Fed. (2d) 235, in which the Court declared:

> "Since the proceedings and orders of a bankruptcy court are interlocutory until entry of the discharge (citing cases, including the above) and may be modified and rescinded before final decree, Simmons Co. v. Grier Bros., 258 U.S. 82, 42 S.

Ct. 196, 66 L. Ed. 475, and if no intervening rights will be prejudiced, the court may grant a rehearing, Wayne Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131, 137, 57 S. Ct. 382, 81 L. Ed. 557."

In the *Wayne Gas Co.* case this Court held that a bankruptcy Court has no terms and may vacate even a final decree in its discretion, even though the appeal period has expired.

See also *Wright v. Board of Public Instruction,* 142 Fed. (2d) 577.

THE DISTRICT COURT OPINIONS.

These opinions appear at pages vii and xiv of appendices C and D and they contain about all of the information that is necessary for a determination of this case.

Judge St. Sure, shows in his memorandum and his order setting aside the submission, the amount which the R.F.C. at all times offered to loan, $802,500 (R. 143), the fact that the indebtedness was paid down to $425,000 (R. 144); and points out that the debtor does not deny Mr. Mason's allegation that it was able to sell and had sold 3¼% bonds, instead of 4% bonds as provided by the plan of composition, resulting in an interest saving of $27,000 for the district; the debtor does not deny that it paid $12,000 to a Chicago firm to bid on the bonds; that the 3¼% bonds were sold to the public by another firm in excess of 101. Judge St. Sure points out that Mason contends the

creditors are equitably entitled to the benefits of these substantial savings; the difference between $802,500 and $425,000 plus the $27,000. Judge St. Sure refers to the case of *Lorber v. Vista I. D.,* 127 Fed. (2d) 628, which the Court remanded for further findings or evidence to determine whether the amount proposed by the plan was all that the district could pay, and points out that it follows that if in carrying out the plan the district does not need to pay what it represents itself as being able to in the plan of composition, then it has not paid all it is reasonably able to pay in the circumstances.

Judge St. Sure's conclusion (R. 146) is that there has been a deviation from the plan, indicating further that the creditors may not only be entitled to the saving made by the district in paying off the R.F.C., but the difference between the interest payable on 3¼% refunding bonds and the 4% bonds, authorized in the plan.

The District Court points out that the consideration which the Court had found to be fair and equitable was not in fact delivered to the creditors. While they received the percentage of their claims provided for in the plan, it has developed that they were entitled to a higher percentage.

Judge St. Sure put his own construction upon the interlocutory decree, and concluded that $802,500 was the measure of ability to pay. Furthermore, in the affidavits for appellant, no material variation from the statement of the matter and showing as contained in the judge's opinion appears.

Petitioner pointed out (R. 291) as the heart of the controversy the following:

> "Where a public debtor has established by interlocutory decree that its ability to pay its creditors amounts to $802,500.00 and where the debtor had hidden assets in the sense that their value was hidden, but which immediately enabled the debtor to pay substantially fifty per cent (50%) out of those assets which it theretofore represented as being of little value, and where the debtor further changes its plan of composition by borrowing from another source, cheaper money, effecting further savings amounting to many thousands of dollars as shown in the affidavits and admissions in this case, is the court bound nevertheless to enter a final decree which would result in enrichment of the debtor and in inequity and injustice to the creditors?"

Petitioner's position is that it does not make any material difference whether the plan of composition offered $802,500 or only offered $660,943, because the following considerations are, he submits, ample to sustain the District Court's decision:

1. The admitted saving of $27,000 in the refinancing of the proposed 4% indebtedness was sufficient to warrant the Court in making its decision; the district makes no offer to share this admitted saving with its creditors.

2. The admission of the fact that the district was able to pay the indebtedness to be composed with $425,000 instead of $660,943 or $802,500 is not satisfactorily explained. This bankruptcy proceeding continues until it is closed. It is submitted that until the

order of discharge is entered the matter is open for proper orders by the Court.

3. The debtor has unquestionably abandoned the plan of composition, before discharge.

4. The debtor has entirely liquidated the original bonded indebtedness of $1,415,033.30 upon which the whole proceeding is based; the original bond issues and warrants which have formed the basis of the composition proceeding have been entirely discharged and paid off. This was done during the course of the proceedings between date of the entry of the interlocutory decree and the application for discharge. It makes no difference if this occurred after the entry of the interlocutory decree any more than if it had occurred before the hearing on the interlocutory decree. The fact is that the debt is totally discharged. This discharge of the indebtedness is in itself sufficient and compelling reason for the District Court judge's decision.

5. A point which is somewhat related to the foregoing is that there is no creditor "consent" further remaining.

6. The plan provided for issuance and delivery of 4% bonds to the R.F.C., not sale of 3¼% bonds to bond underwriters.

7. The district also developed unexpected or hidden assets in the disposal of 65,000 acres of land sufficient to reduce the debt to $425,000. (R. 132.)

8. The use of $12,000 paid to Nuveen & Co. to induce the bid of that firm (who did not get the bonds)

distinctly was not any part of the plan of refinancing appearing in the Court proceedings. The respondent has not shown good faith or frankness with the Court; none of this money saving or new refinancing was shown to the Court, nor does appellant offer to share with the creditors anything of the savings admittedly made.

ARGUMENT.

I. THE COURT'S JURISDICTION OVER THE PROCEEDING, PARTICULARLY AS TO DISTRIBUTION, CONTINUES UNTIL DISCHARGE.

In *Meyer v. Kenmore Granville Hotel Co.*, 297 U. S. 160, at 164, 56 S. Ct. 405, the Court said:

> "But we think it plain that an order confirming a plan of reorganization under section 77B is not the equivalent of a judgment granting or denying a discharge, for, unlike confirmation of a composition, see section 14c, 30 Stat. 550, 11 U.S.C., paragraph 32(c), 11 U.S.C.A., paragraph 32(c), it does not operate as a discharge. The release of a debtor in a reorganization proceeding is contingent upon the performance of its part of the reorganization plan * * * Discharge is effected not by confirmation of the plan but by the final decree. Confirmation of a plan of reorganization is but a step in the administration of the debtor's estate."

It will be observed that Section 32(c) specifically provides that confirmation of a composition "shall discharge a bankrupt from his debts" etc. No such provision is found in the statute under consideration.

The analogy is more to the reorganization statutes in this respect.

Bankruptcy estates may be considered to be in administration as long as there is an asset in the Court's control.

In re Paramount Publix Corp., 82 Fed. (2d) 230.

In *In re Broadway Hotel Co.,* 131 Fed. (2d) 120, at 122, the Court declared:

> "Appellant mistakenly relies upon In re Corona Radio and Television Corporation, 7 Cir., 102 F. 2d 959, in support of his contention in this respect. In this case we held the court without jurisdiction for the reason that the relief sought was inconsistent with the reorganization plan. Before final decree, however, there can be no doubt, but that the court retains jurisdiction of the subject matter. By statute it is expressly authorized to change or modify the plan under certain circumstances." Certiorari denied 63 S.Ct. 664, 665.

The plea of *res judicata* does not embrace the proposition that the Court cannot interpret, control or set aside or amend its prior orders.

American United Life Ins. Co. v. Haines City, Fla., 117 Fed. (2d) 574;

Gentry v. City of Fort Lauderdale, 125 Fed. (2d) 52;

Wayne Gas Co. v. Owens Ill. Glass Co., 300 U.S. 131, 137, 57 S. Ct. 382.

II. THE INTERLOCUTORY DECREE CANNOT BE BINDING ON THE COURT AND THE COURT'S CONSCIENCE SINCE NOT BINDING ON THE BANKRUPT.

We have shown that Chapter IX was specially designed to prevent the plan of composition becoming binding on the district until it should give its consent by making the consideration provided available for its creditors.

That being so, the jurisdiction of the Court to refrain from granting a discharge for reasons of overreaching, fraud, inequity, subsequent developments, bad faith or mistake seems obvious.

The language in *American United Mutual Life Ins. Co. v. City of Avon Park,* 311 U. S. 730, 61 S. Ct. 395, is of considerable significance, where the Court remarks that the power of the Bankruptcy Court is not dependent upon the statute. "It inheres to the jurisdiction of a court of bankruptcy." While perhaps referring to a somewhat different situation, the Court's views are of great importance. Here it is declared:

> "Equity and good conscience obviously will not permit a finding that an acceptance of a plan by a person acting in a representative capacity is 'good faith' where that person is obtaining an undisclosed benefit from the plan. We have emphasized that full disclosure is the minimum requirement in order not to imply that it is the limit of the power and duty of the bankruptcy court in these situations."
>
> "Where such investigation discloses the existence of unfair dealing, a breach of fiduciary obliga-

> tions, profiting from a trust, special benefits for the reorganizers, or the need for protection of investors against an inside few or of one class of investors from the encroachments of another, the court has ample power to adjust the remedy to meet the need."

What we are trying to say is that a mere plea of *res judicata* as to one step in the same proceeding is not sufficient to bar the Court, in the same proceeding, before final discharge, from reopening matters that pertain particularly to distribution of the benefits or the execution of the plan itself. It certainly never was contemplated when the interlocutory decree was entered by Judge Louderback that the district, before it should apply for its discharge would be able to reduce its indebtedness from $800,000 to $425,000. Nor does it make any difference whether the reduction was from $802,500 or $660,943 to $425,000. The fact of its reduction is sufficient basis for the Court to set aside the whole proceeding. Whatever this benefit is, belongs to all the creditors, not just J. R. Mason, whose action is for the benefit of all who are entitled. (R. 138.)

III. A PLAN ABANDONED CANNOT FORM THE BASIS OF A DISCHARGE.

The case of *Ware v. R. E. Crummer & Co.*, 128 Fed. (2d) 114, was an aftermath of the case of *American United Mutual Life Ins. Co. v. City of Avon Park*, 311 U. S. 138, 61 S. Ct. 157. Testimony was taken as to the status of the composition proceedings and

whether another feasible plan could be submitted. Certain funds had been or were about to be withdrawn from the bond and sinking fund. When the mandate of the Supreme Court came down the city appeared unable to devise any plan to substitute for the one which had been rejected, and the Court in effect held that it had no further jurisdiction over the fund or in the matter.

In the case of *Leco Properties v. R. E. Crummer,* 128 Fed. (2d) 110, the Court held that the jurisdiction of the Bankruptcy Court in municipal composition proceedings depends upon the debtor's volition and cannot be extended by the Court beyond that volition. The Court here declared "normally the plan of composition failing, the Court may not administer upon the funds gathered by the city".

When the bankrupt has itself departed from the plan how can it profess its volition?

The effect of these two decisions is to hold that the jurisdiction of the Court depends upon the consent of the debtor and its creditors.

We desire respectfully to call the Court's attention to an article by Mr. Giles J. Patterson of Florida, who was chairman of the Municipal Law Section of the American Bar Association and who has been intimately connected with the development of the Municipal Bankruptcy Act. He writes in an article in the University of Pennsylvania Law Review, Vol. 90, No. 5, and in discussing subdivision (f) has this to say concerning distribution:

> "Some have assumed that the interlocutory decree may authorize the debtor to make distribution of the new securities. The act provides otherwise. Distribution can be made only by the court in its final decree. Distribution made before final decree is at the risk of all parties. If inequity or unfairness result from distribution before a final decree of confirmation has been made, creditors who accept the new bonds will not be protected by the interlocutory order."

Now we think that is a very significant observation. It coincides with the established bankruptcy principle that jurisdiction continues until discharge.

Therefore, where the debtor abandoned the plan of composition and goes into some other plan, such as here, by paying off the principal debtor in full and refinancing elsewhere, there is no longer any consent; there is in effect an abandonment of the plan.

IV. WHEN CONSENT FAILS THE PLAN FAILS.

Composition is a contract, which here is abandoned by one party, who thereafter cannot compel enforcement.

In the case of *In re City of West Palm Beach,* 96 Fed. (2d) 85, the Court pointed to the importance of identity of interest. While the practical effect of this case has been possibly affected by the later enactment by Congress of subdivision (j), nevertheless, the principles proclaimed are still sound. These are that the consent of the creditors must be based upon a bona fide interest. But after a precise plan of compo-

sition has been so accepted, based upon such consent, and the bonds upon which the consent is based during the time of the pendency of the proceeding, are entirely eliminated and wiped out, it is impossible to see how there is any jurisdictional basis for the entry of the final decree. It is just the same as if consenting bondholders had come into Court and said: "We have all been paid in full". The plan of composition must fail with that failure of consent.

No creditor consent survives the cancellation of the bonds.

Wright v. Coral Gables, 137 Fed. (2d) 182.

The Court declared, referring to the basis upon which a plan of composition can be enforced:

> "That base, * * * is the identity of interests of those consenting with those compelled, by their consents to accept the plan."

This decision was affirmed.

City of Coral Gables v. Wright, ...U.S..... (No. 388, Mar. 13, 1944), 64 S. Ct. 779.

Absent the consents of the State, the debtor, and the required per cent of creditors affected by the plan, the Court is without jurisdiction to issue any order or decree, interlocutory or final, and its jurisdiction cannot be extended by the Court beyond that volition.

The jurisdiction of the Court is dependent upon consent of the district.

Green v. City of Stuart, 135 Fed. (2d) 33 (U.S. Supreme Court on Nov. 8 denied petition for rehearing, 12 L.W. 3162).

The debtor must consent to the final decree, but if it is not in a position to consent to the final decree, how can it consent?

The cause is moot.

V. THERE MAY EVEN BE CIRCUMSTANCES WHERE A PLAN OF COMPOSITION CONFIRMED BY INTERLOCUTORY DECREE MAY BE SET ASIDE PRIOR TO DISCHARGE BY FINAL DECREE.

We submit that even in this case, where the interlocutory decree has become final, there were circumstances and factors brought to the Court's attention prior to discharge by final decree which justified the Court, particularly when considered with all the other matters discussed supra, in the action taken.

We refer to the case *In re Bay County, Florida,* case No. 83, M., Bankruptcy, U.S.D., Northern Dist., Fla., Marianno Div., Jan. 6, 1942, where the Court dismissed the petition saying:

> "The credit of the county is now such that, during the pendency of these proceedings, it was able to obtain a contract to purchase a new issue of refunding bonds at 3, 3¼, 3½% interest for cash in amount sufficient to pay on February 1, 1941, all of the outstanding refunding bonds issued under the Plan of 1932. The underwriters in that contract are charged with knowledge of the existence of the amount of unrefunded bonds and accrued interest thereon."

The district did not act in good faith. On the contrary it showed bad faith. It liquidated its indebted-

ness and never informed the Court until brought in by the petitioner.

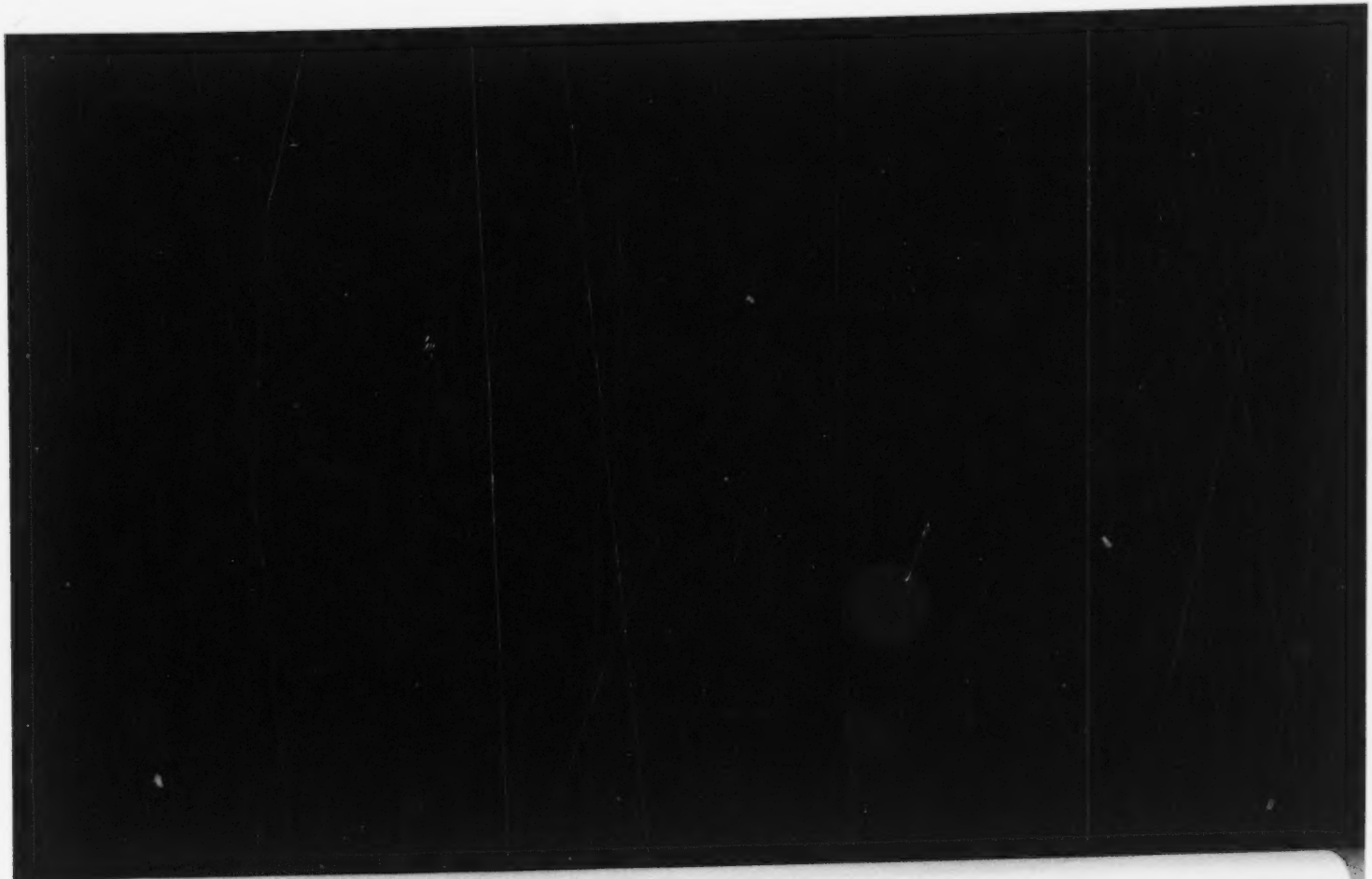
CONCLUSION.

It is submitted that a writ of certiorari should be granted, the decree of the Court below reversed and the proceeding directed to be dismissed.

Dated, Turlock, California,
August 23, 1944.

Respectfully submitted,
W. COBURN COOK,
Counsel for Petitioner.

(Appendices A, B, C and D Follow.)



Appendix A

Section 83(f) of the Bankruptcy Act, 11 U.S.C. 403(f):

"(f) If an interlocutory decree confirming the plan is entered as herein provided, the plan and said decree of confirmation shall become and be binding upon all creditors affected by the plan, if within the time prescribed in the interlocutory decree, or such additional time as the judge may allow, the money, securities, or other consideration to be delivered to the creditors under the terms of the plan shall have been deposited with the court or such disbursing agent as the court may appoint or shall otherwise be made available for the creditors. And thereupon the court shall enter a final decree determining that the petitioner has made available for the creditors affected by the plan the consideration provided for therein and is discharged from all debts and liabilities dealt with in the plan except as provided therein, and that the plan is binding upon all creditors affected by it, whether secured or unsecured, and whether or not their claims have been filed or evidenced, and, if filed or evidenced, whether or not allowed, including creditors who have not, as well as those who have, accepted it."

AFFIDAVIT

State of California,
County of Stanislaus.—ss.

AFFIDAVIT OF J. R. MASON IN SUPPORT OF MOTION.

J. R. Mason, being duly sworn, says that he is a creditor of the above entitled petitioner, owning original bonds of said district as shown by his claim herein, that some of said bonds, to-wit, three (3), were due in 1934 and all of which are outstanding and unpaid; that in 1935 a loan was granted the Glenn-Colusa Irrigation District, herein called the district, for the total of $802,500.00, for the liquidation of its outstanding bonds and warrants which amounted to the sum of $1,110,150.00. The plan of composition provided for payment of 54.535 but the district increased this to 69 by applying cash on hand and the proceeds of treasury bonds on hand.

Affiant is informed, and believes, and therefore alleges the fact to be that after the presentation of this plan to the court, the district retired its warrant indebtedness and, in fact, through funds, the source of which is unknown to affiant, paid down its indebtedness to such an extent that it used only $660,943.00 of the R. F. C. loan, and subsequently as affiant is informed and believes, and therefore alleges the fact to be the financial situation became such that the district before delivering any bonds to the R. F. C., pursuant to the plan of composition, had reduced its indebtedness to $425,000.00, and it did subsequently vote a bond issue of 3¼ per cent

bonds in that amount so that the district has received the benefit of the difference between $802,500.00 and $425,000.00, which difference belongs to the creditors and not to the district. Further, affiant says that he is informed and believes, and therefore alleges the fact to be that the district refused to complete the contract with the R. F. C. and offered to, and paid to Nuveen & Co., of Chicago, Illinois, the sum of $12,000.00 for an offer to take the new issue of bonds; that it subsequently developed that Nuveen & Co. did not take the bond issue because counsel advised the necessity of advertising, and that said bonds were placed on the market and purchased by a syndicate composed of Blyth & Co., Inc., Dean Witter & Co., and Stone & Youngberg, at approximately 97.55 for the issue, that the reduced rate of interest and the premium on the sale of the bonds netted the district approximately $27,000.00, which amount also should be paid to the creditors.

That said bonds were subsequently offered to the public and sold to the public at a price as affiant is informed and believes, and therefore alleges the fact to be in excess of 101; that the creditors should have received the benefit of this additional premium.

The consent to the plan of composition herein representing the majority consent thereto, was filed by the Reconstruction Finance Corporation, and that the indebtedness due said Reconstruction Finance Corporation has heretofore been entirely liquidated and there is no consent of any creditor adversely

effected by the plan of composition holding more than three per cent of the indebtedness now valid or present.

That affiant refers to and incorporates herein the offering of the $425,000.00 bond issue by said syndicate, which is hereunto annexed and marked Exhibit "A"; that all of the information and statements referred to in said offering are incorporated herein as the statements of said syndicate but are not vouched for in all details by affiant.

J. R. Mason.

Subscribed and sworn to before me this 31st day of December, 1942.

(Seal) Gilbert Moody,
Notary Public in and for the County of Stanislaus, State of California.

(R. 100.)

Appendix B

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION.

State of California,
City and County of San Francisco.—ss.

J. J. Hankins, being first duly sworn, deposes and says: That he is one of the attorneys for the above named debtor and makes this affidavit on its behalf.

That petitioner prior to the adoption of any plan of composition had paid any warrants that were outstanding and that at the hearing for the confirmation of debtor's plan of composition all warrants were paid and that by the express wording of said plan of composition it was acknowledged that bonds and their appurtenant coupons were only affected. That petitioner was granted a loan by the Reconstruction Finance Corporation in the total sum of $802,500, but that only $660,943 of said loan was needed to have the Reconstruction Finance Corporation acquire 96% of said bonds and coupons. That subsequent to the R.F.C.'s acquisition of said bonds the debtor, by leasing lands and ultimately selling in excess of 65,000 acres of land which had been deeded to the debtor for the non-payment of its assessments, was able to acquire moneys which it used to pay on the indebtedness it owed to the R.F.C. That at the time of the sale of the debtor's refunding bonds, said indebtedness to the R.F.C. had been paid down to $425,000.

At the hearing held for the confirmation of said plan of composition, evidence was introduced showing the land owned by the debtor and rental it had received and expected to receive from said lands and petitioner was given and had this information.

That debtor did not deliver its refunding bonds to the R.F.C., but pursuant to the provisions of the resolution granting debtor the loan, which was introduced into evidence, and with R.F.C.'s consent, sold said bonds upon the open market and paid the R.F.C. loan in cash.

That said J. R. Mason, upon whose affidavit the motion is based, knew of all of the proceedings taken by the debtor, encouraged the same and at various times claimed that he was responsible for the debtor being able to sell its refunding bonds at an interest rate less than 4% and because of his labor in this connection should be paid par and accrued interest for his bonds, although debtor did not request him to exert any effort on behalf of the debtor but actually believes that the refunding bonds were sold in spite of his efforts.

J. J. Hankins.

Subscribed and sworn to before me this 18th day of January, 1943.

(Seal) Henry B. Lister,
Notary Public, in and for the City and County of San Francisco, State of California.

(R. 132.)

Appendix C

[Title of District Court and Cause.]

MEMORANDUM AND ORDER SETTING ASIDE THE SUBMISSION OF THE MATTER OF MAKING AND ENTERING A FINAL DECREE, AND FOR RESUBMISSION AND RECONSIDERATION OF THE MATTER.

On April 13, 1940, an interlocutory decree confirming plan of composition was entered in the above entitled matter under Chapter IX of the Bankruptcy Act.

The plan provided in substance for the retirement of all the outstanding bonded indebtedness of the District in the principal amount of $1,248,453.66 and unpaid interest coupons maturing after January 1, 1934, by cash payments to the bondholders (except on certain—"sub-treasury bonds" in the amount of $174,-800.00), in amounts between $612.91 and $690.07 on thousand dollar bonds, depending on the maturity dates of the bonds and coupons attached; and by cash payments between $18.44 and $20.34 on $30.00 coupons not attached to bonds, depending upon the maturity dates of the coupons. 56.535 cents for each dollar of the principal amount of the bonds was to be obtained from the proceeds of a loan "not to exceed $802,500" to be obtained from the Reconstruction Finance Corporation; the remainder to be paid by the District. The plan further provided that refunding bonds would be issued to the Reconstruction Finance Corporation in a total amount equal to the amounts disbursed from the loan.

The plan was accepted by the Reconstruction Finance Corporation, the then owner of not less than fifty-one per cent of the securities affected (excluding securities owned or controlled by the petitioner).

Objections of certain minority bondholders to the plan of composition were overruled, and an appeal was taken from the interlocutory decree, which was later dismissed by stipulation on the basis of a decision in a similar action rendered subsequent to the date of the appeal.

Thereafter, the debtor filed a petition for a final decree. J. R. Mason, one of the dissenting bondholders, on behalf of himself and other creditors, filed objections to the entry of a final decree.

There appears to be no dispute over the manner in which the composition was carried out. Mr. J. J. Hankins, one of the attorneys for the debtor, alleges in his counter-affidavit:

> "That petitioner was granted a loan by the Reconstruction Finance Corporation in the total sum of $802,500, but that only $660,943 of said loan was needed to have the Reconstruction Finance Corporation acquire 96% of said bonds and coupons. That subsequent to the R.F.C.'s acquisition of said bonds the debtor, by leasing lands and ultimately selling in excess of 65,000 acres of land which had been deeded to the debtor for the non-payment of its assessments, was able to acquire moneys which it used to pay on the indebtedness it owed to the R.F.C. That at the time of the sale of the debtor's refunding bonds,

said indebtedness to the R.F.C. had been paid down to $425,000.

At the hearing held for the confirmation of said plan of composition, evidence was introduced showing the land owned by the debtor and rental it had received and expected to receive from said lands and petitioner was given and had this information.

That debtor did not deliver its refunding bonds to the R.F.C., but pursuant to the provisions of the Resolution granting debtor the loan, which was introduced into evidence, and with R.F.C.'s consent, sold said bonds upon the open market and paid the R.F.C. loan in cash."

Substantially the same facts are alleged in the affidavit in support of the motion, except that Mr. Mason states that the debtor concealed assets which it used to reduce the loan.

The debtor does not deny the allegation of Mr. Mason that it was able to sell a 3¼ percent bond, rather than a 4 percent bond as represented in the proposed composition, resulting in a saving to the District of $27,000; or his allegation that the debtor paid a premium of $12,000 to a Chicago firm to bid on the bonds, and that the bonds were sold to the public by another firm in excess of 101.

Mr. Mason contends that the creditors are entitled to the difference between $425,000, the amount of the R.F.C. loan remaining at the time the refunding bonds were sold, and $802,500, the amount the District was able to borrow from the R.F.C. He also

claims that the creditors should receive in addition the benefit of the saving in interest on the bonds, or $27,000. His theory is that if "a bankrupt can obtain $802,500.00 to pay his creditors they are entitled to that amount".

In *Lorber v. Vista Irrigation District,* 127 F. (2d) 628, in which there was an appeal from an interlocutory decree confirming a plan of composition proposed by the District, the court stated that the trial court should make a finding to support a conclusion that the payments provided for in the plan are all that the District is reasonably able to pay in the circumstances, and remanded the case to the District Court to make the necessary finding.

It would follow that if, in carrying out the proposed plan, the District does not need to pay what it expected to pay and represented itself as able to pay in the plan of composition, it has not paid all that it is "reasonably able to pay in the circumstances".

There is no showing of fraud or misrepresentation on the part of the District, but circumstances developed that enable it to make the pro rata payments provided for and retire and refund its bonded indebtedness for less than it expected to pay and represented that it could pay. The principles of equity are applicable to bankruptcy matters (*American Ins. Co. v. Avon Park,* 311 U.S. 138, 145), and it seems equitable and just that the creditors and not the debtor should have the benefit of this unexpected saving.

In the interlocutory decree the court found that the plan was fair, equitable, and for the best interests of the creditors. This finding must have been based upon a consideration of the financial condition of the District, its assets and liabilities, and the total amount it was able to raise to pay its debts. The pro rata amount then payable to the creditors would come as a result of dividing up this total, in effect, according to the plan, and the fairness of the percentage then payable to the creditors would be considered only incidentally.

If it is equitable for a debtor to raise, and it is able to raise $802,500 to pay its creditors, it may be that they should receive the percentage on their claims that would result from a distribution to them of this amount, and if the proposed plan actually required the borrowing of only $660,943, there would appear to be a deviation from and a substantial modification of the plan approved by the interlocutory decree, and that that plan has not been carried into effect.

The creditors may also be entitled to the saving the District was able to effect by the issuance of 3¼ percent refunding bonds instead of 4 percent bonds as represented in the proposed plan.

With regard to the sale of property by the District which enabled it to pay the R.F.C. loan down to $425,000 prior to the issuance of the refunding bonds, the question of whether the bondholders are entitled to a credit in the amount of the proceeds of such sale would probably depend upon whether the existence of such assets was revealed to the court at

the time the interlocutory decree was made. If the court knew of these assets it would seem to amount only to a matter of bookkeeping whether the creditors were paid through the sale of the assets or by money borrowed on such assets.

The debtor relies on Section 83 (F) of the Bankruptcy Law, as conclusively determining its right to a final decree. That section provides:

> "If any interlocutory decree confirming the plan is entered as herein provided, the plan and said decree confirmation shall become and be binding upon all creditors affected by the plan, if within the time prescribed in the interlocutory decree, or such additional time as the judge may allow, the money, securities, or other consideration to be delivered to the creditors under the terms of the plan shall have been deposited with the court or such disbursing agent as the court may appoint or shall otherwise be made available for the creditors. And thereupon the court shall enter a final decree * * *."

It states that the only question is whether the funds provided for in the plan of composition were deposited with the disbursing agent.

The consideration which the court found fair and equitable and which the District represented that it was able to pay was not delivered to the creditors. While they received the percentage of their claims provided for in the plan, it developed that they may have been entitled to a higher percentage of the consideration offered by the District. No complexities of financing the plan should alter the situation. The pro-

vision of the Bankruptcy law cited by the debtor would therefore be inapplicable. It is therefore

ORDERED:

1. The motion to set aside the submission of the matter of making and entering a final decree, and for resubmission and reconsideration of the matter is granted.

2. The petition for final decree is denied without prejudice.

A. F. St. Sure,
United States District Judge.

February 23, 1943.

(Endorsed): Filed Feb. 24, 1943.
(R. 142.)

Appendix D

In the Southern Division of the United States District Court for the Northern District of California

In the Matter of GLENN-COLUSA IRRIGATION DISTRICT, Debtor.	No. 29,763-L

MEMORANDUM AND ORDER DENYING PETITION FOR FINAL DECREE.

The Debtor filed a petition for final decree in the above proceeding, and the matter was taken under submission. Certain of the creditors filed objections to the entry of a final decree and moved for a resubmission and reconsideration of the matter. On February 24, 1943, this court made an order setting aside the submission and for a resubmission and reconsideration of the matter, stating its reasons in the memorandum accompanying the order. Further hearing was had, the matter resubmitted, and the debtor and dissenting creditors have filed additional affidavits and points and authorities.

No new evidence or points of law have been presented to the court on the rehearing and resubmission which would alter its opinion as stated in said memorandum. Reference is made particularly to the following paragraph, page 5 of the memorandum:

"If it is equitable for a debtor to raise, and it is able to raise, $802,500 to pay its creditors, it may be that they should receive the percentage on their claims that would result from a distribution to them of this amount, and if the proposed plan actually required the borrowing of only $660,943, there would appear to be a deviation from and a substantial modification of the plan approved by the interlocutory decree, and that the plan has not been carried into effect."

It is therefore

ORDERED:

The petition for final decree is denied.

Dated, June 2, 1943.

A. F. St. Sure,
United States District Judge.

Original filed Jun. 2, 1943 with Clerk, U. S. Dist. Court, San Francisco.

(R. 294.)

SEP 28 1944
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 412

J. R. MASON,
Petitioner,
vs.
GLENN-COLUSA IRRIGATION DISTRICT,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI AND TO BRIEF IN SUPPORT THEREOF.

A. L. COWELL,
17 East Willow Street, Stockton 17, California,
J. J. HANKINS,
Meridian, California,
WRIGHT L. CALLANDER,
Willows, California,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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Answer: There are two conclusive answers to this question. First, it assumes at least two things that are not true.. 18

a It was neither equitable nor possible for the District to borrow more than $660,943 to retire the bonds that had been purchased by R.F.C. at the time of the hearing 18

b. The plan approved by the interlocutory decree was not different from the plan stated in the resolution of November 7, 1935 21

Second, the matter is res judicata 23

The second question 25

Answer to second question:

a. The creditors suffered no injury by the payment of R.F.C. from $660,943 down to $425,000, but they received approximately $125 per $1000 more than they would have received if the District had borrowed $802,-

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500 in 1934 and paid off all the then outstanding indebtedness on the R.F.C. terms 30

b. How R.F.C. was paid down to $425,000 is easily explained 30

c. The matters are res judicata 34

The third question 34

Answer:

a. There was no deviation from the Plan of Composition which in any way damaged or affected the rights of any creditor 35

b. If the District had not made the saving complained of R.F.C. would have made it and the creditors would not have profited 37

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 412

J. R. MASON,
Petitioner,
vs.
GLENN-COLUSA IRRIGATION DISTRICT,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI AND TO BRIEF IN SUPPORT THEREOF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent acknowledges service September 5, 1944, of the Petition for a Writ of Certiorari filed herein. We have also received copies of the printed transcript of the Record in the case. This Record is long, as it includes a narrative statement of the testimony

taken at the hearing in the District Court for confirmation of the Plan of Composition of respondent, with the important exhibits, to show how fully conditions in the respondent district were disclosed to the Judge who confirmed the Plan of Composition.

References to the Record will be made by the use of the letter "R", followed by numbers showing the page or pages where the particular matter is covered.

Frequent reference will be made hereafter to the Reconstruction Finance Corporation as "R.F.C."

The decision below is reported in 143 Fed. (2d) 564.

CORRECTIONS IN SUMMARY STATEMENT.

The "Summary Statement of the matter involved" is mainly correct, but it contains some inaccuracies. While the respondent is governed by the California Irrigation District Law, now Division 11 of the State Water Code of 1943, it was not organized under that act, but is a consolidation of two older districts (R. 2-3), as correctly stated at the beginning of the brief in support of the petition. There is considerable in the Record about the indebtedness of one of these old districts, the Williams Irrigation District, but a plan for the composition of that indebtedness has recently been confirmed in another proceeding and it is not involved in this case.

The consolidated district has jurisdiction over the territory in both the former districts, and it will be hereafter referred to as "the District".

WHAT THE PLAN OF COMPOSITION PROVIDED.

On page 4 of the Petition it was said that there is some confusion as to what the Plan of Composition actually provided in the way of payments and how the plan should be interpreted. The plan itself is set forth in full in the Record (R. 2-16) and it is summarized in the Interlocutory Decree confirming it (R. 59-61). It plainly provides for specific payments varying from $690.72 to $612.91 for $1000 bonds, depending on the earliest maturing coupon attached to each bond, and payments of from $18.44 to $20.34 for interest coupons maturing in 1934 and 1935 and detached from bonds. It provides that if any coupons maturing on or after January 1, 1936, are missing from any bond, the face value of such coupon shall be deducted from the payment for that bond, but that a missing coupon shall be paid for if it is subsequently presented. It is plainly stated that part of these payments, amounting to 56.535 cents on the dollar of principal amount of bonds retired, will be obtained from a loan from R.F.C. and the rest will be made up by the District from the proceeds of the sale to R.F.C. of bonds in the amount of $174,800, called "subtreasury bonds", which had been acquired by the District, but never cancelled, or from other sources of income of the District.

It is stated in the resolution setting forth the plan that to evidence the loan from R.F.C., the District has authorized and proposes to issue and deliver to R.F.C. refunding bonds bearing interest at the rate of 4 per cent per annum, *"in a total principal amount equal to*

all of the amounts disbursed from said loan for the retirement of said bonds", and in the meantime the District would pay R.F.C. interest on the amounts disbursed at the rate of 4 per cent per annum from the respective dates of such disbursements until the refunding bonds were delivered. The District did not deliver the 4% bonds. At the time of the hearing on the Plan of Composition it owed R.F.C. approximately $660,943 (R. 246), but it reduced this amount to $425,000 by the use of the proceeds of the sale of land and the use of other assets (R. 133) and issued refunding bonds bearing 3¼ per cent interest and sold them to a San Francisco syndicate for approximately 97.55, thus effecting a saving to the District estimated at about $27,000 (R. 100-101), although there is some question as to the exact amount.

It would seem that the only interpretation of the Plan of Composition that is needed is whether the statement of intention to issue 4% bonds to R.F.C. is such an *integral* part of the plan that the subsequent issuance by the District of 3¼% bonds and their sale to another agency would constitute a justification for denial of a final decree, especially in view of the fact that the resolution of R.F.C. awarding the loan contained the following provision:

> *"However, if the borrower shall before any new bonds are delivered to this corporation, pay or caused to be paid to this corporation an amount equal to the disbursements it has made to or for the benefit of the borrower with 4% interest thereon until paid, this corporation will thereupon surrender or cause to be surrendered the*

Old Securities then held by it or on its behalf to the Borrower." (R. 178.)

Furthermore an affidavit by J. J. Hankins states that the 3¼% bonds were sold with the consent of R.F.C., pursuant to the foregoing provision, and the R.F.C. loan was paid in cash (R. 133-134).

THE DISTRICT COURT'S ERROR.

Judge St. Sure of the District Court, to whom application for a final decree was made, had no difficulty in understanding the plan, for he made an excellent summary of it (R. 142), although he omitted the provision for deductions for missing coupons. He admitted that it provided for paying the creditors from the proceeds of the loan 56.535 cents on the dollar for their bonds, but he seemed to think that this was not an essential part of the plan, for he said that the Judge who confirmed the plan had found it "fair and equitable". However, counsel for Mr. Mason was so persistent in reiterating that it was equitable and possible for the District to borrow $802,500 from R.F.C. that Judge St. Sure came to believe it and said (R. 147) that, while the creditors *"received the percentage of their claims provided for in the plan,* it developed that they may have been entitled to a higher percentage of the consideration offered by the District", *although the District never offered any more than was provided in the Plan.* In the preceding sentence he said:

> "The consideration which the Court found fair and equitable and which the District represented that it was able to pay was not delivered to the creditors."

This shows that Judge St. Sure did not read carefully the Findings of Fact or the Decree confirming the Plan of Composition, *for neither of them found that any consideration but that stated in the Plan was fair and equitable, and we emphatically assert that the District never represented that it was able to pay any more.* Indeed the Findings expressly contain the following:

> "That the payments to be made *as provided in said plan* are the full amount which it is possible for petitioner to pay on its aforesaid indebtedness." (R. 47, Paragraph VI.)

This indebtedness had just been stated to be bonds in the total principal amount of $1,248,453.66. *How then can it be said that the Court found a greater consideration "fair and equitable"?* Both the Findings and the Decree can be read in vain for any such finding. R. 43-55 for the Findings and R. 56-68 for the Decree.

PETITIONER SEEKS REHEARING IN THIS COURT ON FACTS.

It is stated on page 3 of the petition that Judge St. Sure of the District Court decided that the Plan of Composition had not been carried into effect, but the Circuit Court of Appeals, in reversing his deci-

sion, held that there had been no deviation from or substantial modification of the Plan. The petition states that the matter involved is "largely one of law", but it seems to us that it is a question of fact. *Was there or was there not a deviation from the Plan of Composition?* The decision of the Circuit Court of Appeals was based, *not upon lack of legal power to deny a final decree, but on lack of facts to justify the denial of such a decree.*

It would seem, therefore, that the real purpose of the petition is to obtain a rehearing in this Court upon the facts.

OTHER ESSENTIAL FACTS.

At the beginning of the brief in support of the Petition for Certiorari is a statement headed "Factual Background of the Case". The first, third and fourth paragraphs of this statement are correct. While some of the remaining paragraphs are correct and have been or will be admitted, others are inaccurately stated or are positively misleading, and we shall therefore present such facts as we consider essential to a proper understanding of the case.

INDEBTEDNESS OF THE DISTRICT AT VARIOUS TIMES.

In the fifth paragraph of the statement on the "Factual Background of the Case" it is said that upon the consolidation the District became liable for 6% bonds in the aggregate principal amount of

$1,248,453.16 (R. 4). At the hearing on the Plan, April 27, 1939, before the late Judge Louderback (R. 151), this was corrected to show the number of cents "66". It was also made clear that $1,248,453.66 was the amount of bonds outstanding at that time (R. 152.)

The petition for confirmation of the Plan of Composition (R. 4, Paragraph A) shows that upon the consolidation the District became liable for "all of the bonded indebtedness of old Glenn-Colusa Irrigation District", which was then $2,198,950 (R. 158).

On September 27, 1934, when the loan from R.F.C. was awarded (R. 175), $803,800 of these bonds had been retired, for the total indebtedness of the District then was $1,395,150 principal amount of bonds and $19,883.30 of warrants, *making a total indebtedness of $1,415,033.30* (R. 149).

THE LOAN AND HOW IT WAS DISBURSED.

The affidavit of J. J. Hankins (R. 149) shows that the loan was "in an amount not to exceed $802,500", of which $2500 was to be used by the District to meet the cost of refinancing. The resolution is summarized in the narrative statement of testimony taken at the hearing on the Plan of Composition, and it is there stated to be "a loan of not exceeding $802,500" (R. 175). On page 11 of the brief in support of the petition it is said that from the many cases reviewed this Court will doubtless judicially note

that the words "not exceeding" a certain amount is the regular form of designating a loan by R.F.C. *That is true, and there must be a reason for it.* That reason is that loans to refinance distressed public agencies *have never been flat loans,* but "not exceeding" a specified amount, and the amount of the loan has always, so far as we have observed, been a certain percentage of the face value of the bonds purchased by R.F.C., with deductions for missing coupons, and generally the price paid for the bonds varies downward from a fixed maximum if less than all the outstanding bonds are turned in.

In another affidavit (R. 133) Mr. Hankins states that R.F.C. awarded the District a loan *in the total sum of $802,500,* and this was interpreted by Judge St. Sure to mean that the District could have borrowed that amount of money for its creditors. However, as is shown by the resolution awarding the loan, it was not in a specific amount to be disbursed by the District, *but was to be disbursed by R.F.C. in the purchase of outstanding bonds of the District* on a sliding scale with a maximum payment for each bond of 56.535 cents for each dollar of the principal amount thereof (R. 176) *if all of the bonds were delivered to R.F.C.,* and less payments as the percentage of bonds delivered decreased.

If the total indebtedness of the District at that time, $1,415,033.30, is multiplied by the maximum percentage payment 56.535 cents on the dollar the result is $799,989.08, or in round numbers $800,000, to which was added $2500 to meet the cost of refinancing, and

obviously what Mr. Hankins meant when he said that the District was granted a loan by R.F.C. "in the total sum of $802,500", was that this was the maximum amount of it, for it would have been that much if the indebtedness had remained at $1,415,033.30 and all of the bonds and coupons had been turned in. The loan was granted on the terms specified by R.F.C., *and it is clear that the District could not have gone to R.F.C. and got that amount of money.* The disbursement of the loan was always in the hands of R.F.C. and was "to or for the benefit of the borrower through the purchase of securities issued by the borrower" (R. 176). These securities were to be held by R.F.C. and kept alive as security for the loan (R. 177-178). The statement of Mr. Hankins that the loan was "in the total sum of $802,500" must be interpreted in the light of these facts.

After the acceptance of the loan many of the creditors voluntarily turned their bonds in to R.F.C. for the price offered in the resolution, but this price was not acceptable to a majority of the bondholders (R. 11-12). The District then reduced its indebtedness still further by paying off all the warrants and retiring all the bonds and outstanding interest coupons maturing in 1933 and previously (R. 216). This brought the indebtedness of the District down to $1,248,453.66 principal of bonds and the interest coupons thereof which had matured on and after January 1, 1934 (R. 13). Part of this reduction was due to the acceptance of bonds and coupons in payment of assessments under a law that was afterward declared un-

constitutional (R. 215). These bonds and coupons were all cancelled (R. 226).

In the meantime the District had made arrangements to sell to E. M. Garrison $174,800 of bonds, called "subtreasury bonds", which it had acquired but not cancelled, on condition that they be sold to R.F.C. and the proceeds turned over to the District to increase the amounts to be paid to the creditors (R. 12). How these bonds were acquired and the details of their sale were given by the Secretary of the District (R. 229), who said that some additional money was taken from the General Fund to make up the payments guaranteed by the Plan of Composition. This amount at the time of the hearing was $38,646.12 (R. 218-219).

The resolution offering the bondholders these increased payments for their bonds was adopted November 7, 1935 (R. 11-16). It was called a "plan of readjustment", which was the term used in the first Municipal Bankruptcy Act, which was declared unconstitutional in

Ashton v. Cameron Co. Water Imp. Dist. No. 1,
298 U. S. 513, 80 L. Ed. 1309, 56 S. Ct. 892.

The record does not show whether the District brought a proceeding under that act, but counsel for the petitioner knows that it did and that the proceeding was dismissed after the decision in the *Ashton* case. Nevertheless the deposit of bonds continued and R.F.C. made purchases of bonds November 8, 1935, January 22, January 30 and August 13, 1936 and

November 30, 1937 amounting to $1,208,353.66 principal amount of bonds, leaving only, at the time of the hearing before Judge Louderback, $40,100 in bonds that had not been deposited (R. 246). The percentage then held by R.F.C. was 96.79 per cent. As the petition for confirmation of the Plan of Composition was not filed until November 29, 1937 (R. 23), the bonds purchased by R.F.C. on November 30th in the amount of $9000 were probably deposited in the bank before that date. It follows that all the bonds purchased by R.F.C. at the time of the hearing were deposited voluntarily for the acceptance of the prices set out in the resolution of November 7, 1935.

NEARLY 97% OF ORIGINAL BONDHOLDERS ELIMINATED BY CONTRACT.

As the first Municipal Bankruptcy Act providing for "plans of re-adjustment" of indebtedness of public agencies was declared unconstitutional, there was no legal compulsion on bondholders to accept the "plan of re-adjustment", and the purchase of bonds of the District made by R.F.C. as shown by "Debtor's Exhibit 43" (R. 246) *must be held to have been contract transactions.*

"Debtor's Exhibit 26" is a form of escrow agreement under which bonds were deposited with Crocker First National Bank of San Francisco for acceptance of the offer set forth in the resolution of November 7, 1935 (R. 199-200). It provided for the schedule of

payments set forth in the resolution with some additional interest.

"Debtor's Exhibit 27" (R. 201) was a similar escrow agreement used by the First National Bank of Willows for deposits. It provided for payments of only 56.535 cents on the dollar of bonds deposited, and less prices if less than all the bonds were deposited, but the secretary of the District testified that all the bondholders, except Mr. Garrison, who had agreed to sell his bonds for the R.F.C. price, received the amounts specified in the resolution of November 7th no matter where they deposited their bonds (R. 201).

PLAN OF COMPOSITION ADOPTED.

After the present municipal Bankruptcy Act was enacted, the Board of Directors of the District determined to file a petition under it to have the plan set forth in the resolution of November 7, 1935 confirmed as a Plan of Composition. It was accepted by R.F.C. as such a plan September 11, 1937 (R. 16-21). At that time R.F.C. had over 95 per cent of the outstanding bonds (R. 6). The attorneys of the District were authorized to file a petition for the confirmation of the Plan September 16, 1937 (R. 21-23). It was filed November 29, 1937 (R. 23).

In the fourth paragraph on page 11 of the brief in support of the petition it is said that the amount actually made available to the creditors was only $660,943. This statement is positively misleading. "Debtor's

Exhibit 43" (R. 246) shows that $660,943 was the amount disbursed to the creditors *by R.F.C.*, and *in addition* we have shown that they received the proceeds of the sale to R.F.C. of $174,800 of "subtreasury bonds" (R. 229) as well as $38,646.12 out of the General Fund (R. 219), to make up the payments specified in the Plan of Composition.

An answer to the petition for confirmation of the Plan was filed by certain creditors, including J. R. Mason, the petitioner here, by his present counsel (R. 24-42).

THE APPEAL FROM INTERLOCUTORY DECREE.

A hearing on the petition was held (R. 151) and Findings of Fact (R. 43-55) and an Interlocutory Decree confirming the Plan of Composition (R. 56-68) were signed by Judge Louderback April 13, 1940.

The answering creditors promptly appealed.

DISMISSAL OF APPEAL.

On page 10 of the brief in support of the petition it is said the appeal was dismissed, *but it is highly important for this Court to understand the circumstances of the dismissal.* It was by stipulation of counsel for the petitioner here, who also was counsel for the appellants there. He desired to defer the printing of the Record on Appeal from Judger Louderback's decrees and certain other decrees and made motions in

the United States Circuit Court of Appeals for an order extending the time for that purpose (R. 73). When the motions were made Mr. Cook stipulated (R. 74) that petitions for Writs of Certiorari would be filed in the Supreme Court of the United States in the case of West Coast Life Insurance Co. vs. Merced Irrigation District and Newhouse vs. Corcoran Irrigation District, which had recently been decided against him by the Circuit Court of Appeals, and that, if these petitions should be denied or either of them should not be filed, the Circuit Court of Appeals might enter an order dismissing the appeals in the Glenn-Colusa and other cases.

Thereupon the Circuit Court said that *"the Court accepts the above statement and upon the statement of counsel that he and the moving parties will be bound thereby"*, it was ordered that the motions to defer the printing of the Record in each of the cases be granted (R. 74-75).

Certiorari was denied by this Court in the Merced Case, 311 U.S. 718, and rehearing denied, 312 U.S. 714, and Certiorari was denied in the Corcoran Case, 311 U.S. 717, and rehearing denied, 312 U.S. 714. Thereupon mandate was issued dismissing the appeal in the case of Easton vs. Glenn-Colusa Irrigation District (R. 75-77). The mandate gives the name of the appellants (R. 76) and Mr. Mason the petitioner here is one of them. Therefore he is bound by the stipulation and the order dismissing the appeal.

DEPOSIT WITH DISBURSING AGENT.

As heretofore stated, bonds in the amount of $40,-100 had not been purchased by R.F.C. at the time of the hearing (R. 246). After the hearing these bonds began to come in and by September 29, 1941, only $13,100 of bonds and 17 coupons of the face value of $30 each had not been deposited for acceptance of the Plan of Composition, and on that date the District deposited with the disbursing agent of the Court appointed in the interlocutory decree $9,216.87 to pay for these outstanding bonds and coupons (R. 80-83). This deposit was in accordance with the decree, which required the District to deposit with the disbursing agent "the sum necessary to pay the holders of its old bonds, other than bonds which shall have been purchased by R.F.C. as herein provided, the respective amounts to be paid therefor in accordance with said Plan of Composition" (R. 65, Paragraph V). This decree is now *res judicata.*

Mr. Cook in an affidavit admits that this deposit was the correct amount according to the Plan, for he says:

> "It is not denied that technically the amount of moneys provided by the interlocutory decree have been deposited for the creditors, but the opposition to the granting of a final decree is made on other grounds" (R. 288).

APPLICATION FOR FINAL DECREE AND ITS DENIAL.

No disbursements were made by the disbursing agent (R. 82) and on the 8th day of November, 1941 (R. 83) it made its report to the Court and deposited with the Clerk, as required by the Interlocutory Decree, the entire amount paid it by the District (R. 80-81). The Court made an order September 16, 1942, approving the report (R. 94-95).

May 15, 1942, the District filed a petition in the District Court for a final decree (R. 83-87).

After voluminous proceedings (R. 292) the petition was denied June 2, 1943 (R. 293-295).

The District appealed June 11, 1943 (R. 296).

The Circuit Court of Appeals reversed the order denying the final decree June 20, 1944 (R. 311-318).

There are some other statements in what is called "Factual Background of the Case" that are inaccurate or flatly contradicted by the Record, but they will be dealt with hereafter.

THE ARGUMENT.

In the petition for Certiorari, under the heading, *"Questions Presented"*, only four are specified. We shall consider them in order, with any arguments set forth in the petition or the brief which might tend to support them.

THE FIRST QUESTION.

The First Question is a paraphrase of the only reason Judge St. Sure gave in his memorandum of June 2, 1943, for denying a final decree (R. 294-295). It is stated in general terms, but applying it to the District, it may be accurately and more briefly stated as follows:

> If it is equitable and possible for the District to borrow $802,500 from R.F.C. to pay its Creditors, should they not receive this whole amount, and "if the Plan of Composition required the borrowing of only $660,943", is there not such a deviation from and substantial modification of "the plan approved by the interlocutory decree" as warrants a holding that the Plan has not been carried into effect?

Answer: There are two conclusive answers to this question. First, it assumes at least two things that are not true.

a. It was neither equitable nor possible for the District to borrow more than $660,943 to retire the bonds that had been purchased by R.F.C. at the time of the hearing.

Of course it was equitable for the District to borrow all it could to pay its creditors, but this Court will take judicial knowledge of the fact that 1934, when the loan was awarded, was in the depth of the depression, and no agency would have loaned the District money except R.F.C., and the extent to which it would go was defined in the resolution granting the loan, which was introduced at the hearing as "Debtor's Exhibit 12" (R. 175-180). It provided that the loan should be in an amount "not exceeding $802,500", *not to be given in bulk to the District, but to be held by*

R.F.C. and disbursed by it, as we have heretofore shown, in the purchase of bonds at a maximum price of 56.535 cents on the dollar if all the bonds and coupons were deposited, and less prices if all were not delivered.

The assumption that the District could have borrowed $802,500 is based on an affidavit by J. J. Hankins (R. 133) that the District had been granted a loan "in the total sum of $802,500", but the Second Question shows that this was in 1934, when the indebtedness of the District was $1,415,033.30, and that $2500 of the loan was for the use of the District to help meet the cost of refinancing (R. 149). We have heretofore shown that it would have required approximately $800,000 to meet this indebtedness if it had all been paid at the maximum figure. Read in the light of these facts, Mr. Hankins' affidavit is true.

When the resolution of November 7, 1935, was adopted, stating the District's amended plan (R. 11-16) the indebtedness had been reduced to $1,248,-453.66 (R. 12).

Debtor's Exhibit "22" (R. 187-192) was a copy of a resolution by the Board of Directors of the District authorizing the execution of a contract with R.F.C., giving the terms on which R.F.C. would agree to purchase the old bonds of the District. In the contract R.F.C. agrees to purchase "not to exceed $802,500" principal amount of refunding bonds, to be used to refund the outstanding indebtedness of the District and to pay expenses incidental to the refinancing. The

contract also contained a provision *that R.F.C. should be "under no obligation to purchase refunding bonds beyond the amount necessary, in its judgment, for refunding the indebtedness owed to creditors of the Borrower who join in the plan of re-financing contemplated by the resolution of R.F.C. authorizing this loan"* (R. 189).

The resolution of September 27, 1934, awarding the loan, is expressly made a part of the contract by reference (R. 191).

It was testified that the contract had been executed by R.F.C. and the District (R. 187).

Finally at the hearing before Judge Louderback counsel for the objecting creditors, who represents the petitioner here, *refuted the charge that the Plan of Composition has been changed.* He stated at the hearing (R. 186) that R.F.C. *"had offered a loan which would provide for a maximum payment of 56.535 cents on the dollar for the outstanding bonds"*, and that subsequently, when the bondholders did not accept this offer, the Board of Directors of the District *offered an additional payment of approximately $150.00 a bond.* He contended that the District had no right to offer the additional payment, but his statement stands in the record as his own admission that the maximum payment from the loan was only 56.535 cents on the dollar of bonds turned in, and the District had increased this payment by a large amount.

At the time of the hearing $1,208,353.66 principal amount of bonds had been turned in for $660,942.88

and $40,100 of bonds remained outstanding (R. 246). The payment is slightly less than 56.535 cents on the dollar but it should be remembered that the payments would be less if all the bonds were not turned in and that some deductions would be made for missing coupons.

In the opinion of the Circuit Court of Appeals it is said that R.F. C. "fixed its limit of 56.535 cents on the dollar of indebtedness *and never varied its offer*" (R. 316). It is thus clear that *$660,943 was the maximum amount which the District could have borrowed for the retirement of the bonds which had been turned in at the time of the hearing on the plan.* It is immaterial how much it could have borrowed in 1934 when its indebtedness was greater. *The important fact is that the creditors were all paid the specific amounts provided for in the plan of composition.*

b. The plan approved by the interlocutory decree was not different from the plan stated in the resolution of November 7, 1935.

It will be noted that the first question admits that the Plan of Composition actually required the borrowing of only $660,943 but says there was a deviation from the "plan approved by the interlocutory decree". *A reading of this decree will show that it approved the Plan as stated in the resolution of November 7, 1935, and that plan was strictly carried out.* How, then, could there be a deviation from the plan approved by the Interlocutory Decree?

Judge St. Sure evolved a theory that, as Judge Louderback had found the plan fair and equitable

and as opposing counsel had persistently reiterated that it was equitable and possible for the District to borrow $802,500 from R.F.C. to pay its creditors, Judge Louderback must have meant that the creditors ought to receive this amount of money. *We have shown, however, that $660,943 was the maximum amount that could have been borrowed on the bonds turned in at the time of the hearing.* This is an average price of 54.689 cents on the dollar, but it should be remembered that less than all the outstanding bonds had been deposited at the time and some deductions must have been made for missing coupons, which under the plan would reduce the price.

In the third paragraph from the end of the statement in the brief headed "Factual Background of the Case", it is said the District admits the ability to borrow $802,500. The reference to the Record shows that this statement is based on the affidavit by Mr. Hankins that the District was awarded a loan in the total sum of $802,500. We have shown that this was in 1934, when the total indebtedness of the District would have required $800,000 to extinguish it if all the evidences of indebtedness had been turned in, and that $2500 of the amount was to help the District to meet the cost of refinancing.

The District has never admitted its ability to borrow $802,500, but has consistently contended throughout this appeal that the affidavit of Mr. Hankins should be construed as stating the total amount required to retire all of the indebtedness of the District outstanding in 1934.

Second, the matter is res judicata.

The Circuit Court of Appeals disposed of this and other questions raised on the appeal by saying:

> "We hold that the interlocutory decree is *res judicata* as to the matters therein contained", Citing cases (R. 313).

The rule as to *res judicata* is forcefully stated in *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 84 L. Ed. 329, 68 S. Ct. 581, rehearing denied 309 U.S. 695.

This was a case in which a decree confirming a plan of readjustment of the indebtedness of the drainage district was held to be binding on the creditors, although it was rendered under the act which was afterwards declared unconstitutional. It was found that the question of the constitutionality of the statute had not been raised and this Court said that if it had been decided by the District Court in the proceeding, *that determination would have been final save as it was open to direct review upon appeal.*

The remaining question was declared to be whether respondents, having failed to raise the question in the proceeding to which they were parties *and in which they could have raised it and had it finally determined,* were privileged to remain quiet and raise it in a subsequent suit. Mr. Chief Justice Hughes answered this question as follows:

> "Such a view is contrary to the well settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right in the earlier

proceeding, *but also as respects any other available matter which might have been presented to that end.*" (Italics ours.)

As to the conclusiveness of judgments generally, reference is made to annotations in 11 L. Ed. 76, 38 L. Ed. 429 and 42 L. Ed. 355.

In

Jackson v. Irving Trust Co., 311 U.S. 494, 85 L. Ed. 297, 61 S. Ct. 326,

it is said:

"And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree."

As to the consequences of failure to take an appeal when one is allowed, we cite

Bernards v. Johnson, 314 U.S. 19, 86 L. Ed. 11, 62 S. Ct. 30.

On the last page of the decision various questions were raised but this Court found it unnecessary to decide then and said:

"However erroneous the challenged orders, *the remedy for their collection was by timely application for review or timely appeal*". (Italics ours.)

In support of this statement this Court cited

Union Joint Stock Land Bank v. Byerly, 310 U.S. 1, 84 L. Ed. 1041, 60 S. Ct. 773.

This was a bankruptcy case in which there were strong equities in favor of Byerly. This Court ad-

mitted that an order of the District Court allowing the sale of some of his property was erroneous, but it said on page 7 of 210 U.S.:

> "But the Court had jurisdiction in the premises. Error committed by it in the exercise of that jurisdiction could have been corrected by appeal from its order".

The facts about the loan and the amount actually borrowed to retire the bonds which had been turned in at the hearing were all brought out before Judge Louderback. Section 83(e) of the Bankruptcy Act states *that an appeal may be taken from an interlocutory decree as in equity cases.* We have shown that Mr. Mason was a party to that decree and that an appeal was taken from the decree in which the matters involved in the first question could have been litigated. Therefore, he is conclusively bound by the decree.

THE SECOND QUESTION.

The Second Question assumes some things that are not supported by the Record. It says the Plan of Composition "disbursed only $660,943 to the creditors as the proceeds of the confirmed sale of the debtor's new refunding bonds under the Interlocutory Decree entered in 1940". That decree did not "confirm the sale" of refunding bonds. The refunding bonds referred to in the decree were never sold. The decree is set forth in full (R. 56-68) and merely *authorizes* the District to sell to R.F.C. refunding bonds in an

amount required to pay incidental expenses of the composition "and to pay the sum equal to 56.535 cents on the dollar of principal amount of its outstanding bonds (not purchased by R.F.C.)," and to repay R.F.C. any money expended by it for the purchase of the old bonds of the petitioner as herein provided (R. 63-64, Paragraph III). The decree also authorizes R.F.C. to purchase thereafter any of the old bonds of the District upon the following terms: R.F.C. to pay the sum of 56.535 cents on each dollar of the principal amount of the old bonds, paying nothing on interest of such bonds and deducting for missing coupons as provided in the decree for the purchase of the old bonds by the disbursing agent, and that the District should advance from its own funds "an amount sufficient to pay to each of its creditors who shall so sell such bonds to R.F.C. the difference between the amount to be paid by R.F.C. and the amount to be paid for such old bonds in accordance with said Plan of Composition" (R. 64-65, Paragraph IV).

This refers to the bonds to be purchased by R.F.C. *after the hearing,* and it is extremely important as setting forth Judge Louderback's understanding of *"what the Plan actually provided,* and it confirms the statement in the opinion of the Circuit Court of Appeals, that R.F.C. fixed the limit of the amount it would loan the District "at 56.535 cents on the dollar of indebtedness *and never varied the offer"* (R. 316).

The bonds purchased by R.F.C., as shown in "Debtor's Exhibit 43" (R. 246), *were deposited be-*

fore the petition for confirmation of the Plan of Composition was filed and were purchased by R.F.C. by contract, with the exception of the last $9000 of bonds, when there was no valid law authorizing a bankruptcy proceeding. These are the bonds for which $660,943 in round figures was paid under the terms of the resolution awarding the loan (R. 246). The decree states that at the time R.F.C. accepted the Plan of Composition September 11, 1937 (R. 16-21), it was, and at the time of the hearing still was, the owner of more than 95 per cent of the outstanding bonds (R. 62).

The question further assumes that the Plan of Composition and the Interlocutory Decree provide for the issuance to R.F.C. of 4% refunding bonds in the amount of $660,943 to mature serially, commencing with $14,500 in 1939 and ending with $44,500 in 1968, and R. 188 is referred to. This reference, however, is to the contract between R.F.C. and the District, providing that R.F.C. would purchase "not exceeding $802,500 principal amount of refunding bonds" (R. 187) with the maturities as stated, but limiting the obligation of R.F.C. to purchase refunding bonds to the amount necessary for refunding the District's indebtedness to R.F.C. in accordance with the resolution authorizing the loan (R. 189).

Refunding bonds in the total amount of $802,500, bearing 4 per cent interest, were voted by the District January 15, 1935, as soon as practicable after the loan was awarded. See Debtor's Exhibit 20 "and Debtor's Exhibit 21" (R. 185-186). Neither the Plan of Com-

position, the interlocutory decree nor the contract contains the figures $660,943, but the plan does provide that to evidence the loan from R.F.C. the District *"proposes"* to issue and deliver to R.F.C. refunding bonds "in a total principal amount equal to all of the amounts disbursed from said loan" (R. 15).

If the Second Question were framed to show the pertinent facts, it should state what we have heretofore verified from the Record, including the fact that the District owed R.F.C. $660,943 at the time of the hearing in 1939 (R. 246) but by 1942, and before entry if a final decree, had paid the indebtedness down to $425,000, and then ask:

> "Has not the District Court jurisdiction and power to deny the petition for final decree on the ground that the debtor has not paid its creditors what it fairly and justly should pay?"

In our answer to the First Question we have already shown that $660,943 was all that the District could have borrowed on the bonds turned in at the time of the hearing. Unless the Second Question is a repetition of the First, it must mean that the District should have paid the creditors, instead of R.F.C., the amount necessary to reduce its indebtedness from $660,943 to $425,000. This ignores the fact that R.F.C. had bought and held $1,208,353.66 face value of bonds at the time of the hearing, and the original holders of these bonds were no longer creditors of the District.

The Record does not show the exact amount paid by R.F.C. for the "subtreasury bonds", but they must

have been included in the purchase made by R.F.C. November 8, 1935 (R. 246), for the subsequent purchases were all of small amounts. Dividing the amount paid at that time by the amount of bonds purchased, we get almost exactly 54.7 cents on the dollar as the average price. At that time over 95 per cent and less than 96 per cent of the outstanding bonds had been deposited and the scheduled price was 54.785 cents on the dollar (R. 175), but undoubtedly there were some deductions for missing coupons. If the subtreasury bonds in the amount of $174,800 brought the average price of 54.7 cents on the dollar, the amount realized from them would be $95,615.60, to which must be added $38,646.12, taken from the General Fund (R. 218), making a total of $134,261.72, which the holders of the bonds, other than the subtreasury bonds, that had been surrendered at the time of the hearing received in addition to the price paid by R.F.C. Subtracting the amount of subtreasury bonds, $174,800, from $1,208,353.66, the total amount of bonds purchased at the time of the hearing, we have $1,073,643.66, which shared in the increased payment, or an average of a little more than $125 per $1000 bond. In his statement before the Court (R. 186) Mr. Cook said the District had offered to increase the R.F.C. payment by approximately $150 per bond, but in justice to him, it is proper to say that he was speaking roughly, and $125 is nearer the average increase.

Answer to second question:

a. The Creditors suffered no injury by the payment of R.F.C. from $660,943 down to $425,000, but they received approximately $125 per $1000 more than they would have received if the District had borrowed $802,500 in 1934 and paid off all the then outstanding indebtedness on the R.F.C. terms.

This is clear from the foregoing calculation. The payments to R.F.C. were made in cash from assets of the District revealed at the hearing (R. 196-197, 207, 209-210) and, of course, the assets were depleted by the amount paid. Nevertheless every creditor, except the purchaser of the subtreasury bonds, who had agreed to take only the R.F.C. price (R. 15-16), received the full amount guaranteed in the Plan of Composition (R. 201).

b. How R.F.C. was paid down to $425,000 is easily explained.

In the second point on page 18 of the petition and brief, it is said that how this payment was made "has not been satisfactorily explained" and in the seventh point on page 19 it is said that the District "developed" unexpected or hidden assets in the collection of taxes from 65,000 acres of land sufficient to reduce the debt to $425,000," referring to Record 132. The reference to 65,000 acres of land is at Record 133 in an affidavit by J. J. Hankins. He says nothing about *taxes* from this land, but says that "by leasing land and ultimately selling in excess of 65,000 acres of land, which had been deeded to the debtor for nonpayment of its assessments," it was able to acquire moneys which it used to pay on the indebtedness which it owed to R.F.C. Mr. Hankins does not say that these were the sole sources of payment. Such

moneys were put into the General Fund in various accounts to be drawn out as needed.

In "Debtor's Exhibit 25" was a table (R. 195) showing the acreage of land owned by the District at the end of each of the years 1932 to 1937 and March 1, 1939, just before the hearing (R. 195), and plans for selling this land at $2.00, $4.00, $6.00 or $8.00 an acre according to its quality (R. 196) were explained by H. R. Allard, who had been secretary of the District since its formation (R. 153).

Of course sales of land were made from time to time so that the total acreage owned by the District at the end of each year does not show the total taken by it. This is confirmed by John P. Ryan, a witness for the objecting creditors (R. 263), who testified that sales of land from February 1, 1936, to the time of the hearing amounted to approximately $180,000, including the Spaulding ranch, for which the District received $55,000 (R. 267). This was a ranch of over 11,000 acres which had been sold to the United States for a game refuge (R. 197).

The point of the Second Question seems to be that because the District reduced its loan from $660,943 to $425,000 so quickly it must have been with concealed assets. This is contrary to an emphatic statement of Judge St. Sure February 24, 1943, denying "without prejudice" the motion for a final decree, in which he said:

> *"There is no showing of fraud or misrepresentation on the part of the District"* (R. 145). (Italics ours.)

The Circuit Court of Appeals made a similar statement in its opinion reversing the decision of the District Court, when it said (R. 317):

> "No question of fraud is raised by the proceeding, and, so far as the evidence reveals the conduct of the District's affairs, it would appear that its officers ably and faithfully piloted the District through its distress."

March 1, 1939, the District still had 33,723.15 acres of land which it had taken for delinquent assessments (R. 195).

"Debtor's Exhibit 33" (R. 207-209) was a balance sheet of the District for December 31, 1938, showing that the District then had cash assets in the total amount of $452,610.68, of which $161,087.02 was in an account containing certain money in which the creditors of the old Williams Irrigation District and Reclamation District No. 2047 were entitled to share. The table showed that there was in the General Fund of the District $117,058.68 and in the bond principal fund $69,470.26 and in the bond interest fund $84,674.88. In addition to this the table showed that $20,319.84 was on deposit as an R.F.C. reserve, and the witness stated (R. 210) that he had recommended that $125,000 be deposited in the Federal Reserve Bank to the credit of R.F.C., but that the deposit had not yet been made because of certain questions about the interest to be allowed on it.

Assuming that the lands in the Old Williams Irrigation District owned by the District, amounting to about 7000 acres (R. 162), if sold, should be credited

to the creditors of that District, there would still remain over 25,000 acres of marketable land, and if this could be sold at a net average price of only $4.00 an acre it would bring at least $100,000, to be added to the $125,000 which Mr. Allard had recommended should be deposited to the credit of R.F.C. and $20,000 already on deposit to the credit of that corporation, a total of $245,000 to be credited on the indebtedness of $660,943 to R.F.C., leaving the indebtedness of the District approximately $415,000, or $10,000 less than the amount of the 3¼% bond issue. It is thus clear that *the only question as to the ability of the District to pay its indebtedness to R.F.C. down to at least $425,000 depended on its ability to sell this land.*

The Circuit Court of Appeals in its decision said with regard to the effect of improved conditions in the District:

> "With a greater part of its debt burden removed, with prices for produce greatly improved and the general turn toward prosperity throughout the nation, it is not remarkable that a great improvement was shown in the affairs of the District." (R. 316).

Thus there is no mystery about this payment, and it is clear that Judge Louderback was fully advised of the situation in the District that would make possible the reduction of the R.F.C. debt to at least $425,000.

c. The matters are res judicata.

Under the cases cited in our answer to the First Question, the amount which the District could have borrowed in 1934 and the assets from which it paid down its indebtedness to R.F.C. to $425,000 and all other matters involved in the Second Question were matters of record at the hearing and could have been litigated on the appeal, to which Mr. Mason was a party. This is also true of the amounts to be paid the creditors under the Plan of Composition. Therefore, as the Circuit Court of Appeals held, these matters are *res judicata* (R. 313).

THE THIRD QUESTION.

The statement of the Third Question would have been accurate if it had said that where the Plan of Composition states that the District "proposes" to deliver 4 per cent refunding bonds to R.F.C. (R. 15), and the interlocutory decree confirms the Plan (R. 63) and authorizes the delivery of such bonds to pay incidental expenses of the Corporation and to meet the cost to R.F.C. of bonds already purchased and to be purchased by it (R. 63-64, Paragraph III), but the District, before the entry of Final Decree, is able to and does obtain money at 3¼ per cent and actually issues and sells its new refunding bonds to a new money lender, thus effecting a saving of approximately $27,000, are not the creditors entitled to this saving instead of the debtor?

Answer:

a. **There was no deviation from the Plan of Composition which in any way damaged or affected the rights of any creditor.**

We have admitted in our statement of "essential facts" that the District did not deliver 4 per cent bonds to R.F.C. but did sell 3¼ per cent bonds to a San Francisco syndicate and that "it thereby made a saving", which Mr. Mason estimates at $27,000, although he does not give clearly the basis of his estimate. The exact amount is immaterial here.

The District, at the time of the hearing, owed R.F.C. $660,943 and it paid the debt in hard cash down to $425,000. R.F.C. accepted the money and it alone was affected by the payment.

It was expressly provided in the resolution of 1934 awarding the loan that *if the District should, before any refunding bonds were delivered to R.F.C., pay the full amount then owed to R.F.C., with interest at 4 per cent, R.F.C. would surrender to the District the old securities of the District then held by it.*

This provision is heretofore quoted in full in our statement of essential facts, and in the opinion of the Circuit Court of Appeals (R. 315). The resolution is incorporated by reference in the contract between R.F.C. and the District regarding the refunding bonds (R. 191), and *it is thus evident that it was contemplated from the inception of the loan that the District had the right to pay it off if it could get the money elsewhere.*

As the creditors received the full amounts promised them in the Plan (R. 201), they were not injured by this payment. In

Gentry v. City of Fort Lauderdale, 125 Fed. (2d) 52,

cited in the brief in support of the petition, the Circuit Court of Appeals of the Fifth Circuit held that a certain order that had been made by the District Court was erroneous, but added:

> "It does not follow though that because wrongly based the order must be reversed. Appellants must show more than mere academic error. *They must show injury to them as a result of it.* Appellants, *realizing that this is so,* point to the great reduction in the sinking fund." (Italics ours.)

It was then held that they had been injured by this reduction, and the case was reversed, the Court holding that the requirement of the Plan of Composition for a certain sinking fund was "of the essence of the Composition."

On the other hand, it can make no difference to the creditors where the District gets the money, so long as they receive the full amounts to which they are entitled. How R.F.C. was paid is *not* of the essence of the composition."

In his opinion denying a final decree Judge St. Sure did not mention this point, but rested his denial on the ground that the District failed to borrow $802,500, when he thought it could have done so (R. 294-295).

We have already shown in our answer to the First Question that the District borrowed all it could on the bonds surrendered. In his first decision he said (R. 146) that the creditors "*may*" also be entitled to the saving that the District made by issuing 3¼ per cent bonds instead of 4 per cent, but he never made any positive statement on this point.

b. If the District had not made the saving complained of R.F.C. would have made it and the creditors would not have profited.

R.F.C. was not created as a money lending agency for profit, but to furnish money at less than current rates of interest. If the District had not been protected by the provision allowing it to pay off the loan and conditions developed making it possible to sell its bonds on a 3½ per cent basis, R.F.C., in the exercise of sound business sense, would have sold the 4 per cent refunding bonds at a premium to yield 3¼ per cent, and not even Mr. Mason or his counsel would have been heard to claim the resulting profit for the creditors.

Why, then, should the District be criticised when it accomplishes practically the same result for the benefit of its taxpayers?

c. District proposed to issue 4 per cent bonds in good faith.

When the Plan of Composition was adopted and even at the time of the hearing, no other agency than R.F.C. would have loaned the District money at as low a rate as 4 per cent. Refunding bonds bearing

that rate had been voted in the maximum amount of the loan early in 1935, and to show the creditors that the money to pay them for their bonds was assured the District stated in the Plan that it proposed to borrow most of it from the only source then available and explained how it could make up the rest out of its own funds.

THE FOURTH QUESTION.

In the statement of the Fourth Question there are actually three separate questions presented, which we shall designate as "Question 4a," "Question 4b" and "Question 4c".

Question 4a is that part of the Fourth Question printed on page 5 of the petition, reading as follows:

> "Where the debtor after the date of the interlocutory decree and prior to the entry of a final decree has paid off and discharged the original indebtedness proposed to be composed in the bankruptcy proceedings by obtaining new credit not pursuant to the Plan or the interlocutory decree confirming the Plan, does not the jurisdiction of the Bankruptcy Court to enter a final decree cease and is the Bankruptcy Court not then required to dismiss the proceedings, or as in this case to deny a final decree?"

This question requires some explanation, for counsel for the petitioner seems to be confused about the situation which it attempts to present. In the brief in sup-

port of the petition, point 4 on page 19, he says the debtor has entirely liquidated "the original indebtedness of $1,415,033.30 upon which the whole proceeding is based", and that this was done *"during the course of the proceedings between the date of the entry of the interlocutory decree and the application for discharge"*. We have pointed out in our answer to the First Question that the warrants and some of the bonds constituting this indebtedness when the loan was granted in 1934 were paid *before the Plan of Composition was framed* and that the total indebtedness when the petition for its confirmation was filed *was only $1,248,453.66,* principal amount of bonds, and that only $1,208,353.66 of these bonds had been surrendered to R.F.C. at the time of the hearing, for which, under the terms of the loan, it would pay only $660,943. *All these facts were verified by references to the Record.*

This was the amount of the District's indebtedness to R.F.C. and it is ridiculous to say, as counsel does on page 23 of the brief, that it was never contemplated that the District before it should apply for its discharge "would be able to reduce its indebtedness from $800,000 down to $425,000", because the indebtedness to R.F.C. never was $800,000 and the amount paid off was only $235,943. We have shown in our answer to the Third Question that the resources from which this could be done were fully shown at the hearing.

The indebtedness to be composed under the plan is of three classes. The first class is composed of the

bonds which had been purchased by R.F.C. prior to the hearing, amounting to $1,208,353.66 (R. 246). They were purchased by R.F.C. without legal compulsion on the original owners and were owned by it, subject to the right of the District to pay off the amount invested in the bonds by R.F.C. and get the old bonds.

The only consent to the Plan of Composition was given by R.F.C. (R. 16-21), and it covered bonds in the amount of only $1,197,353.66 (R. 16). The bonds in the amount of $2000 purchased August 13, 1936, and the purchase of $9000 of bonds November 30, 1937, were not included in the consent.

There were bonds in the total principal amount of $40,100 that had not been deposited at the time of the hearing (R. 246). Of these $27,000 had been turned in voluntarily up to September 29, 1941, and they constitute the Second Class. The bonds of the Third Class are those in the principal amount of $13,100 and detached coupons in the total amount of $510 (R. 84), for which $9,216.87 was deposited with the disbursing agent September 29, 1941 (R. 81), and by it deposited with the Clerk of the District Court (R. 80-81).

The bonds of the First Class were the private property of R.F.C., and if it chose to waive any so-called deviation from the Plan and surrender them to the District, no one could complain who was not injured. The original holders of the bonds cannot complain for they sold their bonds to R.F.C. on contract and received every cent promised them.

Question 4a then simmers down to this:

> Where the District in the Plan of Composition "proposed" to issue and deliver 4 per cent bonds to repay its loan from R.F.C. and the interlocutory decree confirmed the Plan and authorized the delivery of bonds, but the District paid off the loan partly out of its own resources and partly by borrowing money at 3¼ per cent from another source, as it had been given the right to do in the resolution awarding the loan, do these facts terminate the jurisdiction of the District Court to enter a final decree?

In point 7 on page 19 of the brief the 65,000 acres of land which the District sold is called "hidden assets," in spite of the fact that Mr. Ryan, a witness for the creditors, testified that the land sales at the time of the hearing had amounted to $180,000 and the District had over 33,000 acres of land still to sell. We have shown that if 20,000 acres of this land could be sold at a net average price of only $4.00 per ace, the money received, together with available cash assets, would be more than enough to reduce the indebtedness to at least $425,000, and these assets were shown to Judge Louderback.

In his first opinion Judge St. Sure said on this point:

> "If the Court knew of these assets, it would seem to amount only to a matter of bookkeeping *whether the creditors were paid through the sale of the assets or by money borrowed on such assets*" (R. 147; Appendix C, attached to petition and brief, page xii). (Italics ours.)

It would therefore seem that payment of part of the debt to R.F.C. with cash instead of bonds would not terminate the jurisdiction to grant a final decree. If the issuance of 4 per cent bonds to pay R.F.C. is thus not "of the essence of the Composition," why should it be fatal to the Court's jurisdiction to issue a final decree if the District uses ordinary business sense and borrows the rest of the money at 3¼ per cent instead of paying R.F.C. 4 per cent, especially when the resolution awarding the loan expressly gave it the right to do so.

Question 4b asks whether a composition is not a contract which, when abandoned or departed from by the debtor, can no longer be enforced.

We emphatically deny that the Plan has been abandoned or deviated from by the District, but assert that *our statement of facts shows a strict adherence to every material detail of it.* The creditors who deposited their bonds were promptly paid the full amounts promised them. R.F.C., which held most of the bonds as security for its loan, was paid in full the amount owed it by the District. Then the District deposited with the disbursing agent, as required by the interlocutory decree, "the sum necessary to pay the holders of its old bonds, other than bonds which shall have been purchased by R.F.C. as herein provided, the respective amounts to be paid therefor in accordance with said Plan of Composition" (R. 65, Paragraph V). Thereupon, as the statute provides, the Plan became binding upon these creditors. The

other creditors had already disposed of their bonds to R.F.C., which had surrendered them to the District and they had been cancelled. The District then applied for a final decree, to which under the statute it was entitled. Section 83(f) of the Bankruptcy Act, providing for a final decree, is printed in full as Appendix A, attached to the petition herein. The form of decree submitted to Judge St. Sure is in strict compliance with the statute (R. 85-87).

Question 4c asks whether the consent of the majority bondholders can survive the liquidation and cancellation of their bonds when cancelled before the entry of a final decree.

In the fifth reason for granting the writ, on pages 6 and 7 of the petition, it is argued that this Court should determine that where the debt represented in the composition has been fully liquidated and cancelled before jurisdiction of the Bankruptcy Court ceases and before final decree, the proceedings should be dismissed.

The answer is that *no consent is required by statute for the entry of a final decree, and there is no reason why there should be.*

See Appendix A, attached to the petition and brief.

We have already shown that the only consent to the Plan of Composition was given by R.F.C. It held its bonds till long after the hearing on the Plan and when the Plan had been confirmed the purpose of its consent was accomplished.

All that is required for the final decree is that the consideration "to be delivered to the creditors under the terms of the Plan shall have been deposited with the Court on such disbursing agent as the Court may appoint or shall otherwise be made available for the creditor". It was made available for them, for every creditor who surrendered his bonds received the full amount promised him in the Plan; and when it became apparent that no more bonds would be surrendered voluntarily, the District, on the 29th day of September, 1941, deposited with the disbursing agent, in strict conformity with the interlocutory decree, "the sum necessary to pay the holders of its old bonds, other than bonds which shall have been purchased by R.F.C. as herein provided, the respective amounts to be paid therefor in accordance with said Plan of Composition" (R. 65, Paragraph V). Thereupon, according to the statute, the Plan became binding upon the holders of these bonds and the District became entitled to a Final Decree. This provision of the Interlocutory Decree is *res judicata. There is no requirement that the consenting creditor or creditors keep their bonds until a final decree is entered.*

It is assumed that the District's debt has been fully liquidated. It is true that all the old bonds, except $13,100 held by the objecting creditors, have been cancelled, but the District still owes $425,000 on the 3¼% bonds issued to pay off R.F.C., less any of those bonds that have matured.

Therefore there is no reason why the jurisdiction of the District Court to issue a final decree has ceased.

PUBLIC INTEREST DOES NOT REQUIRE CERTIORARI.

One of the reasons given for granting the writ is that this Court has never interpreted the statutory requirements for a final decree. It seems to us that the statute is so plain as not to require interpretation. In

Mason v. Merced Irr. Dist., 126 Fed. (2d) 920,

the petitioner here contended that the final decree issued in that case interfered with the governmental powers of the Merced District and the question arose only upon the entry of the final decree. The Circuit Court of Appeals, however, said:

> "Appellant is mistaken. If there was any interference of the nature complained of, the interference was effected by the interlocutory decree. It was that decree which declared the Plan of Composition to be binding on the bondholders and which relieved the district from the necessity of levying taxes to pay the bonds. *The Final Decree determined nothing except that the district had carried the interlocutory decree into effect"* (Italics ours).

A petition for a Writ of Certiorari was denied by this Court (317 U.S. 645), and rehearing was denied (317 U.S. 707). It should be noted that the Interlocutory Decree makes the Plan binding on the creditors on condition that the debtor makes the consideration provided for in the Plan available for the creditors.

EQUITY FOLLOWS THE LAW.

On page 22 of the brief in support of the petition, counsel cites

> *American United Mutual Life Ins. Co. v. City of Avon Park,* 311 U.S. 190, 85 L. Ed. 91, 61 S. Ct. 157,

to the effect that the power of a Bankruptcy Court is not dependant upon the statute as it is a Court of Equity. Nevertheless the decision in that case recognizes that where the law prescribed a practicable procedure *the law must prevail, regardless of any equitable considerations.*

This is expressly held in

> *Securities & Exchange Commission v. U. S. Realty Co.,* 309 U.S. 649, 84 L. Ed. 1203, 60 S. Ct. 724,

in which it was said:

> "A Bankruptcy Court is a Court of equity (Sec. 2, 11 U.S.C.A. Sec. 11), and is guided by equitable doctrines and principles *except insofar as they are inconsistent with the act"* (Italics ours).

Inasmuch as the provisions of the statute regarding a final decree are plain and the District has strictly complied with it and the provisions of the Interlocutory Decree for a final decree, and the form of final decree submitted to the District Court is in strict accordance with the statute (R. 85-87), it should have been signed, as the Circuit Court of Appeals decided.

TWO MATTERS NOT TO BE CONSIDERED.

Complaint is made in the brief in support of the petition that the Findings of Fact are inadequate. This point cannot be considered by this Court for two good reasons:

a. The matter is *res judicata* under the decisions cited in our answer to the First Question.

b. The matter is not mentioned in the petition for the writ.

The same point was raised in

Washington V&M Coach Co. v. National Labor Relations Board, 201 U.S. 142, 81 L. Ed. 965, 57 S. Ct. 648,

and this Court said:

"The petition for certiorari made no mention of any claim with respect to the sufficiency of the evidence to support the findings. In the light of this fact the question is not open for decision here."

A number of cases to the same effect are cited in the margin, and the holding is supported by the provision in Rule 38 of the Rules of this Court that only the questions specifically brought forward by the petition for a Writ of Certiorari will be considered.

This holding also applies to the payment of $12,000 to Nuveen & Co., of which complaint is made in Point 8, on pages 19 and 20 of the brief. *That point is not even hinted at in the Petition for the Writ.*

POWER OF THE DISTRICT COURT.

Although it is suggested in the first part of the Fourth Question presented in the petition that the jurisdiction of the District Court to enter a final decree has been terminated, it is inconsistently argued in Point 4 of the "Reasons for Granting the Writ", on page 6 of the Petition, that this Court should determine that the District Court is empowered to interpret the Interlocutory Decree and even to modify it.

We have not paid much attention to this point because the decision of the Circuit Court of Appeals was not based on lack of power to modify the Interlocutory Decree or to deny a final decree, *but on lack of facts to justify either action.*

Several cases are cited in the brief in support of the petition to show that the District Court has power to modify an Interlocutory Decree of this kind even after the time for an appeal has expired. We believe these cases are inapplicable here in view of the fact that an appeal was taken in this case and dismissed under a solemn stipulation that it might be dismissed if this Court denied petitions for certiorari in two other cases. It did deny both of them, and that ended this case as to all matters raised or which could have been raised on the appeal.

The leading case on the power of the Bankruptcy Court over its judgments is

Wayne United Gas Co. v. Owens Ill. Glass Co., 300 U.S. 131, 137-138, 81 L. Ed. 557, 57 S. Ct. 382.

This was a proceeding for corporate reorganization under Section 77b of the Bankruptcy Act as amended. After stating that a Court of Bankruptcy sits continuously and has no terms, this Court said that it thought the lower Court had the power, for good reason, to revise its judgments upon seasonable application and before rights had vested on the faith of its action, and added that Courts of law and equity have such power limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal. This Court added that there is no controlling reason for denying a similar power to a Court of Bankruptcy or limiting its exercise to the period allowed for appeal. This Court then said:

> "The rule which governs the case is that the Bankruptcy Court in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a re-hearing upon application diligently made and re-hear the case upon the merits; and even though it re-affirms its former action and refuses to enter a decree different from the original one, the order entered upon re-hearing is appealable and the time for appeal runs from its entry".

It then said that two days after the Circuit Court of Appeals dismissed the petition for allowance of appeal from the original order Petitioner notified Respondents of its intention to apply for re-hearing and that prompt application was made and the case was promptly heard.

This is quite different from the action here, where more than three years after the Interlocutory Decree was entered, the District Court denies a final decree and justifies its action on a strained interpretation of the Interlocutory Decree, which could have been made at any time after that decree had been entered if there was any sound reason for it. To put the case more concretely, at the time of the hearing petitioner here knew that the District owed R.F.C. only $660,943. If he thought the District could have borrowed $802,500, he should have promptly made a motion to revise the Interlocutory Decree or litigated the matter on the appeal, to bring himself within the rule quoted above. Instead, he waited nearly three years, until the end of December, 1942 (R. 95-96) and then came forward with an afterthought, which is flatly contradicted by every applicable part of the Record of the hearing before Judge Louderback. If the matter were not already *res judicata,* he should be denied further hearing for lack of diligence.

We shall not prolong this reply by reviewing the cases cited in the brief in support of the writ. When read in the light of the foregoing facts, we find nothing in them to change our belief that the petition for a Writ of Certiorari should be denied.

Dated, Stockton, California,
September 25, 1944.

A. L. Cowell,
J. J. Hankins,
Wright L. Callander,
Attorneys for Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 412

J. R. MASON, *Petitioner,*

vs.

GLENN-COLUSA IRRIGATION DISTRICT, *Respondent.*

PETITION FOR REHEARING.

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GLENN-COLUSA IRRIGATION DISTRICT,
Respondent.

PETITION FOR REHEARING.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, J. R. Mason, respectfully submits this petition for rehearing in this cause.

There is pending in this Court a petition for a Writ of Certiorari in the case of *H. M. Lorber, et al., Petitioners, v. Vista Irrigation District, Respondent,*

No. 624, October Term, 1944, which petition, however, is not at the moment in time for submission to this Court but it embraces at least one of the same questions as the instant petition, and presents additionally other questions which the petitioners confidently expect will cause this Court to grant a petition for a Writ of Certiorari. Should such a petition be granted in the *Lorber* case, it seems to the petitioner herein that a petition for rehearing should be granted herein and for that reason, if for no other, this petition for rehearing is filed.

There is, of course, an important difference in the two cases in that the instant appeal is from the final decree, while the Lorber petition is from an interlocutory decree. Nevertheless, the cases involve complete refinancing and liquidation of the debt of the public corporation prior to the entry of the final decree and before the interlocutory decree had become in anywise binding upon the bankrupt.

To paraphrase the language of the Honorable A. F. St. Sure, the district judge whose decision was reversed by the Circuit Court,—if it is equitable for a debtor to raise, and it is able to raise $802,500.00 to pay its creditors, and the plan as finally executed furnished to the debtors an amount greatly less, it would appear that there has been a deviation from, and a substantial modification of the plan approved by the interlocutory decree.

It would appear also that the creditors are entitled to the saving which the district was able to effect by

the issuance of 3¼ per cent refunding bonds instead of 4 per cent bonds as represented in the proposed plan.

It is submitted that it is an elemental proposition that where the bankrupt still under the jurisdiction of the Court liquidates the debt which he proposes to compose, the proceedings should be dismissed.

It is respectfully submitted that the matter of the issuance of a Writ of Certiorari be reconsidered and the petition therefor granted.

Dated, Turlock, California,
November 8, 1944.

J. R. MASON,
Petitioner.

W. COBURN COOK,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, W. Coburn Cook, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Dated, Turlock, California,
November 8, 1944.

W. COBURN COOK,
Counsel for Petitioner.